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at 10 a.m.
New York

SUMMARY RECORD OF THE 17th MEETING

Chairman: Mr. LEHMANN (Denmark)

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AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. CEDE (Austria) said that the codification of a workable procedure to be applied prior to taking countermeasures should constitute the centrepiece of the codification endeavour on the topic of State responsibility. The idea of applying the notion of crime prevailing within the realm of domestic law to determine the procedure to be followed prior to taking countermeasures gave rise to problems. Moreover, in the absence of an obligatory international jurisdiction having the authority to apply punitive measures against a delinquent State, it could be counterproductive. Austria was in favour of the obligatory jurisdiction of the International Court of Justice, as demonstrated by the declaration it had made under Article 36 of the Statute. However, only a minority of States had made such a declaration. In those circumstances, it was not worth wasting time on a concept based on a utopian view of international relations which was of little help in finding solutions which would effectively influence the behaviour of States.

2. Austria was therefore dissatisfied that the Commission was still working on a subject which should have been eliminated from the list of priority topics, particularly since a number of States had taken the view that it was futile to try to impose notions of domestic law on the relations between States. The codification of State responsibility should concentrate on approaches adapted to the specific needs of inter-State relations. That meant that proposals that were "unattuned to States' sense of international law" must be discarded since the principles par in parem non habet imperium and societas delinquere non potest would continue to stand in the way of any attempt to establish a regime governing the responsibility of States based on a notion of crime.

3. The second subject dealt with by the Special Rapporteur in his report did not merit priority either. Adding another set of rules on the peaceful settlement of disputes to the rules already in existence was of very limited importance for the codification of international law on State responsibility.

4. Article 13, on the issue of proportionality, was one of the cornerstones of the text, since it was designed to provide a primary regulatory element for the establishment of a reasonable and acceptable regime on countermeasures. The concept of proportionality, although broadly accepted in legal doctrine, was difficult to apply, as the International Court of Justice itself had recognized. Indeed, since there were no objective criteria for establishing proportionality, a court or a conciliation commission would have to assess the effects of a violation and of countermeasures after the violation had taken place and the countermeasures had been adopted. That raised the problem of the lack of specific criteria which could be applied by States wishing to apply countermeasures that were within the law. Article 13 did not address that question because it did not take into account the effect of the countermeasure on the author of the internationally wrongful act.

5. His delegation therefore considered that the Commission's decision to link the notion of proportionality to the regime of prohibited countermeasures envisaged in part two, article 14 was correct, but felt that it was inappropriate to prohibit any conduct which derogated from basic human rights, since neither the text nor the commentary indicated specific criteria for determining which human rights were "basic".

6. Other parts of the draft articles also gave rise to significant problems. Article 18, paragraph 1 (f) was mandatory in form ("all States shall ... take part"), and its adoption would amount to a tacit amendment of the constituent instruments of the international organizations concerned. Moreover, article 19, concerned with the right of States to have recourse to the International Court of Justice when an international crime had been or was being committed, left a number of questions unanswered. For example, in paragraph 2, a State against which a claim was made was entitled to bring the matter before the International Court of Justice, but it was not specified who the respondent would be. Nor was it clear what would happen in the case of crimes committed by States which were not parties to the convention. Lastly, the adoption of paragraph 3 would in practice amount to an amendment of the Charter which would not correspond to the procedure for amendments laid down in the Charter.

7. His delegation proposed that at its next session the Commission should reconsider its work schedule on the topic of State responsibility with a view to completing its work in 1999 and that, in particular, the Commission should be requested to determine which rules were indispensable for an early establishment of a regime of State responsibility, which rules should have priority for consideration by the Committee or a diplomatic conference, and which issues could be codified at a later stage. It also proposed that the Special Rapporteur should be requested to prepare proposals on the topic, taking into account the comments made by States in the Committee or sent to him before March 1996.

8. Lastly, since, at the current stage, a convention might not be the most suitable format to give effect to the principles reflected in the draft articles that had been provisionally adopted, the Committee should consider the possibility of adopting an alternative instrument, endorsing principles which already had a high degree of acceptance, and trying to find compromise solutions to other issues, particularly the most controversial issues.

9. Mr. PERRIN DE BRICHAMBAUT (France) said that his delegation's position on the concept of "State crime" had not changed since the previous session. In its view, the absolute dichotomy that some were trying to establish between crimes and delicts was false, since there was a continuum ranging from minor breaches to very serious breaches. Moreover, the argument that a crime was distinguishable from a delict in that it constituted a violation of an international obligation which was essential for the protection of the fundamental interests of the international community was flawed. Even though international obligations could be defined in principle, it was not clear who would determine that such obligations were essential in nature, particularly in relation to the international community, a concept which, although corresponding to a political reality, was an indeterminate entity from the legal point of view.

10. Another postulate of article 19 was that very serious breaches constituted a crime and would therefore be comparable to crimes defined in national criminal codes. However, in his delegation's view, State responsibility was sui generis, neither criminal nor civil, but purely international. Moreover, criminal justice presupposed a legislator with the authority to define crimes and establish corresponding penalties, but at the international level there were no authorities empowered to attribute criminal responsibility to States or compel them to respect criminal legislation that might be applicable to them. In that respect, it should be made clear that, if the Commission did not intend to establish a criminal responsibility of States, it should stop using the term "crime", since that would give rise to criminal responsibility.

11. His delegation was opposed in principle to attributing crimes to States. The indictment of a State could lead to the punishment of an entire people, which would be unjust. From the point of view of international law, the State was an abstract legal entity consisting of a territory, a population and a set of institutions and, although it existed in the legal and political sense at the international level, in essence it was legally neither good nor bad, neither innocent nor guilty.

12. With regard to the consequences of internationally wrongful acts characterized as crimes, the definition of "injured State" raised difficulties because of the confusion surrounding the very concept of "State crime". Since that notion was based on the rather unjuridical concept of "international community", all member States of that community could be deemed to be injured States, a corollary that was difficult to accept. Consequently, a distinction should be made between directly injured States and other States.

13. Moreover, draft articles 15 to 19 of part two raised problems of compatibility with the legal regime laid down in the Charter. The Commission was tending gradually to venture into the field of maintenance of international peace and security, thereby encroaching on the competence of the Security Council. In that regard, the role assigned to the International Court of Justice in article 19 of part two of the draft was particularly open to question. That article conferred upon the Court a kind of a priori competence, by entrusting it with the task of determining whether, in a given case, an international crime had been committed. A grave danger of provoking a conflict between the Court and the Security Council was thus being incurred. In addition, article 19 was at variance with the principle laid down in Article 36, paragraph 2 of the Statute of the International Court of Justice, which provided that the Court's competence depended on the prior consent of the State. Given the current state of international law and of the organization of international society, it was difficult to accept that position, which was lacking in realism.

14. With regard to the settlement of disputes, the mechanism provided for that purpose attributed, once again, binding competence to the International Court of Justice. The fact was certainly welcome that such competence was limited to countermeasures and that, in other cases, only the initiation of negotiations was mandatory; yet the limitation was not only arbitrary, since there was no reason to place exclusive emphasis on countermeasures, but also inadequate. It was necessary to reconcile the desire to improve the cohesiveness and

organization of the international community with the demands of the real world. One possible solution would be to make part three of the draft optional.

15. The Commission should try to ensure that its drafts would command broad acceptance. When the Charter assigned to the General Assembly the role of encouraging the progressive development of international law, it meant by the term "progressive" that such development should proceed at a pace that was consistent with the evolution of international society, a consistency that guaranteed respect for the rules on the part of States. Moreover, the Commission should not go beyond its mandate, since, in its desire to prescribe to States the manner in which they should act in the event of an "international crime", it was inappropriately venturing into terrain that was eminently political.

16. As for international liability for injurious consequences arising out of acts not prohibited by international law, an attempt had been made to define the concept of "harm", and particularly that of "harm to the environment" without, in the latter case, achieving any satisfactory result, since the definition was more concerned with arrangements for compensation than with the harm itself, whose own definition combined heterogeneous elements.

17. Article C, "Liability and reparation", advanced the general principle on which the draft articles were based. However, at the current stage of its consideration of the topic, the Commission did not define the characteristics of liability arising from significant transboundary harm caused by acts not prohibited by international law. In that regard, it should be recalled that State liability could not but have a subsidiary character vis-à-vis the liability of the entity which engaged in the activities that gave rise to the transboundary harm. The mere recognition of the subsidiary liability of States for the harm caused by wrongful acts would indicate considerable progress for international law, given that so far States had accepted it only in specific treaty instruments, such as the Convention on International Liability for Damage Caused by Space Objects. Consequently, without prejudice to the final form which the draft articles should have, it seemed useful to prepare a compendium of the principles on which States could base their efforts to establish their own liability regimes.

18. Mr. CALERO RODRIGUES (Brazil), referring to article 13 of the draft articles on State responsibility, which enunciated the principle of the proportionality of countermeasures, said that the article's requirement that there should be proportionality on two counts - in relation to the degree of gravity of the wrongful act and in relation to the effects thereof on the injured State - might create more problems than it solved. Consequently, it would be sufficient to give a general indication that countermeasures should not be out of proportion to the internationally wrongful act.

19. From a technical point of view, the title of article 14, "Prohibited countermeasures", was inadequate, since in fact the article dealt with actions or conduct which were wrongful ipso jure and could not be considered as countermeasures. His delegation considered satisfactory the enumeration in the article of acts and conduct which were unacceptable as countermeasures. Subparagraph (a), which strictly speaking might be unnecessary, since it was

already contained in subparagraph (e), should be retained at the head of the list, given the paramount nature of the prohibition of the use or threat of use of force among the peremptory rules of international law. With regard to subparagraph (b), on coercion, his delegation supported the current formulation, except with regard to the concept indicated by the word "designed". That term meant that the State applying coercive measures must have the intent of endangering the territorial integrity or political independence of the other State, but what mattered was whether the countermeasures constituted an actual danger, whether or not that was the intent of the State applying them.

20. The seven provisionally adopted articles on the settlement of disputes were by and large acceptable to his delegation. It was interesting that a distinction should have been drawn between voluntary arbitration and mandatory arbitration, which would begin when requested by a party against which countermeasures had been taken. The articles adopted did not envisage judicial settlement and only occasionally gave the International Court of Justice a technical role of confirming or denying the validity of an arbitral award. There was no recourse on appeal to the International Court of Justice.

21. The inclusion of mandatory conciliation was also to be welcomed: although it did not produce binding determination, it could clarify the issues and establish the bases for a settlement. The inclusion of mandatory arbitration was also welcome. Before a State applied countermeasures, a third party should decide whether there were reasons for their application and whether they were within the limits established by the law. If it was felt that mandatory pre-countermeasures arbitration would impose too long a delay in the response of an injured State, a special commission or an impartial commissioner might be empowered to determine whether or not there was justification for the application of countermeasures.

22. With regard to the legal consequences of acts characterized as "crimes", he was afraid that the Special Rapporteur's proposals, which nevertheless represented a brave effort, were too conservative and made no significant contribution to resolving the issue.

23. In relation to delicts, all injured States were entitled to apply countermeasures. He entirely agreed with the removal of the element of excessive onerousness but had doubts about the other changes suggested.

24. Although the limitation of the substantive rights of the injured State was reduced, only a new obligation would be imposed on the wrongdoing State not to oppose missions sent to its territory for the purpose of verifying whether the obligations of cessation and reparation were complied with, which was admittedly little.

25. A new element introduced in article 19 was that a decision of the International Court of Justice would be required before States were authorized to apply countermeasures. The adopted text had two deficiencies: the first was that such jurisdictional control would not apply to all countermeasures, and the second was that the intervention of the International Court of Justice would not take place before a "political" decision had been taken, which made the whole procedure a clumsy one.

26. He agreed that international society currently was not structured to deal with "crimes"; unsurmountable difficulties would persist regarding the implementation of the articles as long as conditions of decentralization prevailed in the international community. It was possible that some of the problems with which the Commission had been struggling might be insoluble unless a radical change occurred in some of the fundamental conceptions of international life. In any event, the Commission should for the time being give up its attempt to regulate the consequences of international crimes in the draft articles.

27. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he was reluctant to accept the idea that only activities entailing risk could give rise to liability, since liability should be based on the fact that harm had been caused, independent of the nature of the activity which helped produce the harm. Accordingly, he welcomed the text of article C, notwithstanding the fact that it referred to "harm caused by an activity referred to in article 1", which currently covered all activities which involved "a risk of causing significant transboundary harm". That concept was too restrictive; in any event, that was the first time that the Commission unambiguously asserted its intention to move towards its ultimate goal, the regulation of liability.

28. Turning to the tenth report of the Special Rapporteur, he agreed that it was necessary to consider both the liability of the operator and the liability of the State, but he could not agree that the State should be liable only for its failure to comply with the obligations of prevention, as was stipulated in draft article 5. If that were the case, there would be no need for a special provision and the matter could be regulated by the rules pertaining to State responsibility. Although he could agree that only a unitary notion of liability existed, based on harm, liability would arise when substantial transboundary harm occurred, entailing the obligation of reparation, which would be the responsibility of the operator or the State, according to what was determined.

29. As to the articles suggested, in article 21 there was a choice between two alternatives, the second of which provided that the State would have no liability at all. He could not imagine that the Commission could reach such a conclusion after so many years of debate.

30. The tenth report dealt next with the responsibility of the operator, which was aptly called civil liability. The relevant articles were well drafted, although further consideration should perhaps be given to whether they also could be applied to situations in which the State was either an operator or a victim of harm.

31. Draft article H might run counter to the principle that the process of ascertaining the causal link should be based entirely on objective evidence. Draft article I raised delicate and complex issues relating to the enforceability of judgements and those issues required much closer scrutiny.

32. In a separate section, the Special Rapporteur provided a competent analysis of the procedural channels which might be used for the enforcement of liability, which was a difficult issue because the injured party could be individuals or

entities, in particular, the State, and the channels applicable to one were not always suitable for the others.

33. Lastly, the Special Rapporteur seemed to have some sympathy for solutions considered in other instruments: domestic courts assisted by technical advisory bodies, or claims commissions. Given the variety of situations which might arise, additional machinery might prove necessary. In any event, the question of procedures required further study.

34. Mr. HE (China) said that the Commission had encountered considerable difficulty in drafting the articles in part two of the draft articles on State responsibility concerning the legal consequences of acts characterized as crimes. The problem lay in the fact that the proposed articles were based on the widely challenged concept of "State crimes". Since the validity of the concept was extremely controversial, it might be wise to defer their consideration until the second reading, when they could be considered in conjunction with article 19 of part one, which had been adopted on first reading.

35. Theoretically, in the light of the maxim societas delinquere non potest, it would be difficult to transplant the concept of crime to the realm of State responsibility. In view of the fact that the international community comprised sovereign States which were on an equal footing and that there was no supranational judicial organ, it would be impossible to apply criminal law.

36. In international practice, the Nürnberg and Tokyo military tribunals had tried individuals who, as State leaders, had been responsible for having planned and led crimes against the peace and security of mankind. Consequently, it was the individual rather than the State that should bear criminal responsibility, although the State should not be immune to responsibility for providing compensation for the damages caused. The same considerations applied to the international tribunals established with respect to the former Yugoslavia and Rwanda, and to the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. Accordingly, a "State crime" did not exist in contemporary international practice.

37. Nevertheless, the possibility of establishing that concept should continue to be explored in the process of the progressive development of international law. The Special Rapporteur proposed, in draft article 19, that the General Assembly, the Security Council and the International Court of Justice should combine their respective functions to determine the existence of a State crime. It must therefore be asked what the nature would be of the assessment to be made by the Security Council and the General Assembly. If the Council and the Assembly were asked to exercise a de facto judicial function, that would contravene the relevant provisions of the Charter. If, on the contrary, the assessment was of a political nature, it would affect the mandates and practice of the United Nations bodies responsible for maintaining peace and security, in accordance with the Charter. Furthermore, paragraph 3 of draft article 19 was contrary to Articles 18 and 27 of the Charter.

38. In the case of the International Court of Justice, its compulsory jurisdiction was based on the principle of voluntary acceptance by States.

However, paragraph 5 of draft article 19 was incompatible with the principle and its adoption would make it necessary to amend the Statute of the Court. Furthermore, the Court lacked the necessary technical means to handle a criminal litigation and determine the existence of a State crime.

39. The draft articles in part three of the draft, relating to the settlement of disputes, had three features. Firstly, by covering almost all the mechanisms envisaged in the Charter, they could offer more options to the parties to the dispute. Secondly, arbitration could be resorted to only with the consent of the parties, except in the case of a State which had been subjected to countermeasures. Thirdly, the International Court of Justice would be competent to decide on the validity of an arbitral award only at the request of the parties concerned when the validity had been challenged and the parties had not agreed on another tribunal.

40. Lastly, with regard to the difficulties encountered concerning part two of the draft articles, the Commission should not resolve the matter simply by a majority vote. The Commission should engage in patient and thorough consultations in order to find a viable solution acceptable to most States.

41. Mr. MIKAELSEN (Denmark), speaking on behalf of the Nordic countries on the question of State responsibility, welcomed the fact that the International Law Commission had approved draft articles 1 to 7, relating to settlement of disputes, given the possible impact of part three of the draft on the provisions concerning countermeasures. The incorporation of a compulsory dispute settlement procedure might obviate the necessity for special provisions concerning countermeasures.

42. However, the imperfections of contemporary international society, which had not succeeded in establishing an effective centralized system of law enforcement, had obliged the Commission to accept the use of countermeasures. Therefore, instead of a general clause on mandatory dispute settlement applicable to the entire draft, the Commission had suggested the more limited approach set forth in article 5, paragraph 2. The Nordic countries welcomed that approach, however limited it might be.

43. It should be noted, however, that according to that paragraph, only the State against which countermeasures had been taken would be entitled to request mandatory arbitration. A certain imbalance would thus be created between the rights of the States in litigation, a question which was regulated in article 12 of the chapter on countermeasures. The impact of article 5 on article 12 would still need to be considered closely.

44. As to the draft articles proposed by the Special Rapporteur on the consequences of crimes and the settlement of disputes with respect to crimes (arts. 15 to 20 in part two and art. 7 in part three), the Nordic countries agreed in principle with the idea of distinguishing between international delicts and international crimes and spelling out in the convention the legal consequences of a crime committed by a State.

45. However, the Nordic countries were deeply concerned about the system introduced in article 19 since, although the final decision would be left to the

International Court of Justice, by introducing the political element inherent in decisions of the General Assembly or the Security Council, an unfortunate mixture of competences between the judicial and political bodies of the United Nations would ensue. It would be preferable to concentrate on the role assigned to the Court under the proposed scheme.

46. Mr. ODEVALL (Sweden), speaking on behalf of the Nordic countries on the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that modern international law relating to the theory of liability for such acts had gained ground rapidly. The intensification of activities which might involve extreme danger had made it increasingly necessary to establish mechanisms capable of preventing extraterritorial damage or of compensating for it when it occurred.

47. The general principles on liability had been largely incorporated into international treaty and customary law. The conferences held in Stockholm in 1972 and in Rio de Janeiro in 1992 had demonstrated clearly the existence of an opinio iuris on the question of State liability and had given an impetus to the codification process.

48. The Special Rapporteur's eleventh report focused on the role of harm. The articles elaborated by the Commission reflected general principles and served as comments on selected provisions adopted previously. Thus, article A reaffirmed principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. Article B established the basic principle of prevention, which was fundamental in that context. Article C was still in an embryonic stage and should be further elaborated. Article D complied fully with the objectives set forth in principles 13 and 27 of the Rio Declaration regarding cooperation in good faith among States.

49. The Nordic countries felt that the Commission should elaborate a declaration of principles and formulate more specific rules. The main purpose should be to prevent damage and provide reparation when damage had occurred. It was therefore particularly important to develop a framework for guaranteeing the protection of innocent victims from the consequences of transboundary harm.

50. Ms. ŠKRK (Slovenia) said that the slow progress on the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on State responsibility was due to the fact that both drafts concerned matters related to a sphere of international law which, during the past 50 years, had been dealt with almost exclusively in the Security Council on the basis of political rather than legal considerations. The future Code would have to complement the future system of an international criminal jurisdiction and promote the unification of domestic criminal law and practice concerning the prosecution of perpetrators of the most serious crimes against international law. The Code should therefore take the form of a multilateral treaty and should be harmonized with the statute of the future international criminal court

51. Although Slovenia had not opposed the longer list of crimes initially proposed for inclusion in the draft, it realized that the restriction ratione materiae of the Code was a key issue and that attention must be focused on six crimes: aggression, genocide, crimes against humanity, war crimes,

international terrorism and illicit traffic in narcotic drugs. Her delegation felt that the proposed new definition of aggression had the advantage that determination of the existence of a crime no longer depended on a decision of the Security Council, but it found unconvincing the Special Rapporteur's argument for omitting several paragraphs of the definition of aggression contained in General Assembly resolution 3314 (XXIX). However, it supported the text of draft article 19, including paragraph 2, under which attempted genocide would give rise to criminal responsibility.

52. With regard to the new text of draft article 21, Slovenia felt that the original intention to include in a single group both crimes against humanity as recognized by customary law on the basis of the Charter of the Nürnberg Tribunal, which applied only in time of war, and systematic and massive violations of human rights, represented an attempt to further the progressive development of international law. However, in the statutes of the criminal tribunals for the former Yugoslavia and Rwanda and in the draft statute of an international criminal court, crimes against humanity were defined as part of customary law in their original meaning on the basis of the Charter of the Nürnberg Tribunal, and the Special Rapporteur should observe that practice.

53. Slovenia regretted the Special Rapporteur's reluctance to consider the 1977 Protocols to the Geneva Conventions of 1949 as a part of positive international law. Over two thirds of the nations of the world were parties to those protocols, which was evidence of the existence of a general practice. Slovenia supported the inclusion of international terrorism and illicit traffic in narcotic drugs in the Code and agreed with the Special Rapporteur's proposal that the crime of apartheid should be replaced by a crime of racial discrimination of corresponding gravity. On the other hand, it felt that the Commission should not be too hasty in omitting colonial domination and other forms of alien domination from the draft under study and that, in any case, the draft should include the crime of wilful and severe damage to the environment among crimes against the peace and security of mankind. The Commission should also try to specify penalties for each crime, precluding the death penalty. Last, Slovenia felt that the principle of non-applicability of statutory limitations for war crimes was an integral part of the general principles of criminal law and should therefore be included among the general provisions of the draft Code.

54. Turning to chapter IV of the Commission's report on State responsibility, she said that the debate had focused on the distinction between the concepts of State crimes and international delicts and on the consequences of internationally wrongful acts which were characterized as crimes. However, her delegation felt that the Commission had far more serious legal problems to overcome with regard to State responsibility, such as the question of an injured State.

55. It was obvious that the consequences of a crime might not affect all States in the same manner. In some cases, the notion of an injured State might encompass States directly affected by the crime and other States that might suffer less evident consequences of it. The question of legal interest in a case of crime should be dealt with more precisely, for it raised the question of locus standi when the matter was brought before an international judicial body.

In principle, legal action taken against the State responsible for a crime and any countermeasures must not have a punitive character, but must be aimed at the effective cessation of the wrongful conduct and guarantee that it would not be repeated.

56. The General Assembly and the Security Council, as political organs, could not be involved in the implementation of the special legal consequences deriving from crimes.

57. As for part two of the draft relating to the content, forms and degrees of international responsibility, her delegation felt, for the moment, that the draft articles on proportionality and prohibited countermeasures were satisfactory.

58. Regarding the draft articles in part three, relating to the settlement of disputes, special attention should be paid to the possibility that a State against which countermeasures had been taken might unilaterally submit a dispute to an arbitral tribunal, since the question affected the balance of interests between the injured State and the State that had committed the wrongful act. Inasmuch as such a provision favoured the peaceful settlement of disputes, it should not be regarded as favouring the interests of the wrongdoing State. If, in an arbitration proceeding, one of the parties challenged the validity of the arbitral award, that challenge should be elaborated in greater detail.

59. Mr. MOMTAZ (Islamic Republic of Iran), replying to those members of the International Law Commission who had denied the possibility of distinguishing between international crimes and international delicts, said that the distinction was based on the Charter of the United Nations, Chapter VII of which instituted a special regime for dealing with violations of the obligation not to resort to force, an obligation that was distinguished by its gravity from other international obligations. That distinction was also to be found in the practice of the International Court of Justice, and specifically in the 1970 decision concerning the Barcelona Traction case and in the 1986 decision regarding military and paramilitary activities in and against Nicaragua.

60. It must be determined before which body and on what legal basis a State might be accused of an international crime. The fact that the General Assembly, the Security Council and the International Court of Justice played a role in the proposed procedure was an advantage, for those international organs were sufficiently representative. Nevertheless, the choice of the two main political organs of the United Nations entailed a number of difficulties. Attributing new powers to them would require revision of the Charter. Nevertheless, most acts that might be classified as crimes were sufficiently grave to constitute an unquestionable threat to peace and therefore fell within the competence of those two organs, especially the Security Council. Actually, the main drawback was that both those organs were subject to political fluctuations and, as had already occurred, might adopt a complacent attitude with regard to very serious wrongful acts, especially in the case of the Council, whose members, having the right of veto, were assured full immunity.

61. Given the importance of the rights infringed upon when fundamental norms of the international community were violated, it was in the interest of all States

to be protected. A mechanism would have to be conceived that would enable States to have unilateral recourse to the International Court of Justice with a view to determining whether a crime had been committed and defending the general interest. Use might be made of the formula of the Vienna Convention on the Law of Treaties, whereby States parties to a dispute regarding the application or interpretation of a norm of jus cogens could have unilateral recourse to the Court, especially where such norms and the international obligations whose breach constituted an international crime were very similar. As it was in the interest, legally speaking, of the international community that norms should be respected, an arbitration clause might be included, which would in fact transform the action into a genuine popular public action.

62. Should States accept the compulsory jurisdiction of the Court for characterizing wrongful acts as international crimes, the Court must take the necessary steps to minimize the duration of the judicial process.

63. Once a wrongful act had been characterized as a State crime, its possible legal consequences must be determined. To the extent that it was accepted that the perpetration of such acts was harmful to all States, the author State would obviously be responsible vis-à-vis all the others. For that reason, the Special Rapporteur had considered that all States were injured, though he had recognized that that might create a chaotic situation owing to a multiplicity of claims. Therefore, a distinction must be made between directly and indirectly injured States, the right to compensation being recognized only in the case of those having suffered material damage. It would be dangerous and contrary to international law to permit all States to apply countermeasures. In any event, in order to determine the legal consequences of acts characterized as crimes, the Commission must define the concept of "injured State" and amend article 5 accordingly.

64. An effort must be made not to proceed by analogy with internal law, for enormous difficulties would result if it were stipulated that a State responsible for an international delict need only compensate for the damage, whereas a State responsible for an international crime would incur a penalty. Even if it were accepted that a State which committed a crime incurred criminal responsibility, the penalties should be in keeping with the nature of that collective entity known as the State. It was inconceivable that the consequences of a crime should jeopardize the territorial integrity or political independence of the State which had committed the crime.

65. The draft articles on the settlement of disputes ran counter to the principle of free choice of means of peaceful settlement embodied in Article 33 of the Charter and in General Assembly resolutions such as the Manila Declaration on the Peaceful Settlement of International Disputes, under which it was for States to agree upon pacific means suited to the circumstances and the nature of the dispute. It would be preferable to include the responsibilities connected with the draft articles in an optional protocol on compulsory dispute settlement, to be annexed to the proposed convention.

66. The decision, reflected in article 4, to combine conciliation with fact-finding was correct, for separating the two functions might delay final settlement of the dispute. However, the commentary to that article made no

mention of the principle that the receiving State must grant its consent to fact-finding missions. Indeed, such missions might create difficulties rather than providing solutions, for a dispute could not be settled by means of an inquiry carried out against the will of a State. Undoubtedly, States would refuse fact-finding missions only on exceptional grounds.

67. Lastly, referring to article 1 of the Annex to the draft articles, which provided for the drawing up of a list of conciliators, he recalled that the Secretary-General, at the request of the General Assembly, had on many occasions prepared such lists, which had never been used because the extremely varied nature of the disputes rendered it virtually impossible to select in advance the experts who should make up conciliation commissions.

The meeting rose at 1.10 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
18th meeting
held on
Thursday, 19 October 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 18th MEETING

Chairman:	Mr. LEHMANN	(Denmark)
later:	Mr. CAMACHO (Vice-Chairman)	(Ecuador)
later:	Mr. LEHMANN (Chairman)	(Denmark)

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AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. MÜLLER (Germany) said that a compilation of all the draft articles on State responsibility, supplemented by brief notes indicating major problems and controversies, would greatly facilitate analysis of the issues.

2. Any codification of the rules of State responsibility would have to strike a balance between two objectives: on the one hand the ideal of having all disputes relating to alleged wrongful acts settled by orderly and cooperative procedures and, on the other hand, the necessity of defining the preconditions and modalities of legitimate self-help.

3. Turning to the question of the special consequences of so-called international crimes, he said that the extension of "injured State" status to all States as conceived in draft article 19 of part one as well as the consequent extension to all States of the right to take legitimate countermeasures under draft article 11, paragraph 3 of part two would be viable only if the future convention made such a reaction subject to measures of control as proposed in draft articles 15 to 20 of part two.

4. His Government was concerned about the mechanism introduced in draft article 19 of part two. The functions envisaged for the General Assembly, the Security Council and the International Court of Justice in that article would seem to contradict basic provisions of the Charter. The problem lay with the concept of "international crimes" as a distinct category of wrongful acts in the context of State responsibility. His Government shared many of the concerns expressed in that regard and considered that the response to international crimes should be found not in the context of State responsibility but rather in the prosecution of criminals by a permanent international criminal court and action by the United Nations under its Charter. The concept of international crimes had not been translated into a workable set of rules for implementation which would meet the criterion of balance he had referred to earlier.

5. With regard to the settlement of disputes, the first question that arose was that of coordinating the means for dispute settlement and for self-help. He proposed a provision stipulating that before taking countermeasures States must make a serious effort to reach a negotiated solution in the sense of draft article 1 of part three. It was nevertheless probable that in practice negotiations and measures of self-help would be undertaken simultaneously.

6. A second question related to the general role of the mechanism for dispute settlement envisaged in the draft. That specific mechanism should be clearly subordinated to existing mechanisms, which should be used first.

7. The last question referred to the role assigned to the International Court of Justice in draft article 7 of part three. The intention of that article would be clearer if its wording included language from the 1958 Model Rules on

Arbitral Procedure spelling out the grounds on which the validity of an award could be challenged.

8. Mr. Camacho (Ecuador), Vice-Chairman, took the Chair.

9. Mr. PASTOR RIDRUEJO (Spain), referring to the controversy aroused by the treatment of international crimes as a concept distinct from that of simple international delicts, said that the sociology of international relations made it possible to speak of two major categories of violations of international law. The mere infringement of unimportant rules provoked a response only from the injured State. On the other hand, serious and flagrant violations of important rules aroused concern in the entire international community. International law must be consistent with the distinction made by the international community and attribute to international crime special consequences such as the actio popularis and the other consequences referred to in the Special Rapporteur's special report.

10. The key question was who would determine that such a crime had been committed. He wondered whether the formula proposed by the Special Rapporteur would function effectively without prior reform of the Charter. Moreover, no matter how desirable general acceptance of the formula might be, his delegation did not consider it likely, as it involved three of the main organs of the United Nations and might give rise to conflicts between them. Moreover, it provided for compulsory jurisdiction in a series of matters on which, given their strong political content, States had shown themselves reluctant to accept jurisdiction.

11. Turning to the articles on the settlement of disputes, he pointed out that article 3 provided for compulsory recourse to conciliation, which was acceptable to his delegation. With respect to article 5, it would not have mattered to his delegation if compulsory competence had been attributed to the International Court of Justice rather than to an arbitral tribunal. On the other hand, his delegation was concerned that the drafting of article 7 gave the Court nullifying authority. Simply referring to the "validity of an arbitral award" without specifying the grounds on which it could be challenged would make it difficult for the losing State in the arbitration not to resort to the Court. His delegation therefore supported the proposal made in the Commission to include in the article the grounds for nullity referred to in the Model Rules on Arbitral Procedure.

12. Lastly, with respect to chapter V of the report, he noted with satisfaction that the Commission had provisionally adopted articles A, B, C and D, which were important because they dealt with the general principles of transboundary harm. He welcomed the provisional adoption of articles 1 to 20, relating to activities having a risk of causing transboundary harm. However, he pointed out that the definition of transboundary harm omitted harm caused in spaces not subject to the sovereignty, jurisdiction or control of a State, such as the high seas, the international seabed, outer space, celestial bodies and Antarctica. His delegation wondered why such harm had been excluded.

13. Ms. WONG (New Zealand) said that although the topics of State responsibility and international liability had some similar strands, it would be a mistake to confuse them. The liability topic referred to a situation where a particular activity, although not illegal, gave rise to harmful consequences and thus entailed obligations relating to compensation or restitution as well as obligations to give prior notification of the proposed activity and to undertake an assessment of its environmental impact. Given the importance of the topic, she regretted that a complete text was not yet available but welcomed the work done by the Commission on notification and prevention.

14. Her Government believed that the obligation to make a prior assessment of the activity was already embodied both in international treaties such as the Convention for the Protection of the Natural Resources and Environment of the South-Pacific region and in international customary law. The purpose of the environmental impact assessment was to determine in advance whether an activity entailed an unacceptable degree of risk to the environment and to balance the desired benefits of the activity against the risks it involved.

15. International law contained measures relating to the duty to prevent harm to the environment. The question remained as to what the international legal consequences would be if a State persisted with an activity that entailed risk. The desire to define environmental crime was understandable, but that approach risked creating further confusion if the Commission also attempted to deal with the problem by means of prior notification or restricting it to activities which involved a risk. That would not help to protect the environment and risked limiting the issue to a determination of what constituted an environmental crime. While her delegation supported the Commission's work on the issue of prevention, it believed that if it did not go beyond the question of notification and risk and the four principles adopted in 1995, the Commission might do better to focus its efforts on a topic specifically related to environmental harm. She therefore welcomed the proposal to undertake a feasibility study aimed at beginning work on a topic concerning the law of the environment.

16. In conclusion, it was not acceptable that States should proceed with potentially harmful activities without providing assurances to other States that the risks of such harm had been ascertained and appropriate measures taken to avert them. If the activities did produce harmful consequences for other States, there must be a legal consequence, which would be liability; in other words, the polluter must pay.

17. Mr. VILLAGRAN KRAMER (Guatemala) said that, before progressing further on the topic of the Code of Crimes, the Sixth Committee should clarify whether or not the regime of the international responsibility of States arising from delicts should be the same as that applicable to international crimes.

18. For Spanish-speaking jurists, the terms "delito" and "crimen" were synonymous, and in the judicial field a distinction was made between liability arising from delicts or crimes and that emanating from quasi-delicts or from breach of contract. Nevertheless, it must be recognized that the concept of jus cogens and the decision of the International Court of Justice in the Barcelona Traction case had established a new dichotomy leading to different regimes of

liability and consequently to an increased level of responsibility when crimes imputable to the State were involved.

19. He understood that reservations had been expressed to the idea that the existence of international crimes could lead to the concept of State crime and thus to punishment of a State. In practice, however, that had never happened, although there could be individual responsibility in the case of international crimes which would be imputed to the individuals who decided that the acts constituting such crimes should be carried out.

20. In any case, his delegation sought clarification as to whether the crimes encompassed by the Code were the same ones the Commission considered to be crimes when discussing State responsibility or whether they were different, so that the only ones giving rise to aggravated international responsibility would be those in article 19 of part one of the draft articles. The Commission might also explore the possibility, when discussing aggravated international responsibility, of considering the crimes contained in the Code as international crimes, while others would only entail the international responsibility attributable to delicts.

21. After considering aggression as an international crime, he concluded that both the aggravation of a State's international responsibility and the application of measures or sanctions by the United Nations would be determined by the gravity of the acts or omissions that were considered international crimes.

22. The Commission's position implied that, in the case of delicts, only injured States could react, whereas in the case of international crimes, the range of affected States was broader, since the international community as a whole was injured.

23. Regarding countermeasures, he said that in article 12, which had been adopted by the Drafting Committee, and to which the Special Rapporteur had objected, it was implicit that the injured State must not be both judge and party, and must allow the dispute to be settled peacefully; that was the reason for insisting on the use of binding dispute settlement mechanisms. A significant advance, which deserved support, was the provision of article 5 whereby the State against which countermeasures had been adopted was entitled unilaterally to submit the dispute to an arbitral tribunal.

24. Regarding the legal regime of reprisals, he pointed out that the difference between delicts and crimes made it advisable to remove some of the restrictions on the exercise of the right to reprisals and, in the case of crimes, selectively to relax the prohibitions established for delicts.

25. The provisions regarding the settlement of disputes arising from delicts would enable disputes resulting from an arbitral award to be resolved more easily. As for the procedures proposed for dealing with international crimes, they constituted a first approximation. The important thing was that the discretional power to punish other States could not be left in the hand of States which considered themselves affected. The basis of the legal regime of international responsibility arising from international crimes was rooted in the

assurance that the international community, organized within the framework of the United Nations, was the entity competent to authorize the application of countermeasures and impose collective sanctions. Regional organizations could play a major role in that respect, although the applicable rules had to be clearly defined.

26. The Charter of the United Nations provided States with various ways of seeking relief and asking for sanctions, and empowered the Organization's organs to act at times of crisis or when tensions had lessened. In practice, both the Security Council and the General Assembly had extensive possibilities for taking action, and the only organ whose competence was restricted was the International Court of Justice. Thus, it could be concluded that the procedure for dealing with international crime would be to turn, on the one hand, to the Council and Assembly and, on the other hand, to the International Court of Justice, which would necessitate a revision of the latter's Statute.

27. Lastly, he reaffirmed his conviction that, in the case of international crimes, the right of States to react unilaterally must be restricted.

28. Mr. BIGGAR (Ireland) said that the fruits of the Commission's work currently constituted the greater part of codified international law, and similar sentiments could be expressed to its contribution to the progressive development of international law. He was therefore reluctant to criticize the work of the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He was, however, forced to point out that the Commission's work had lost some of its direction.

29. In law, as in life, the number of possible variants was almost infinite. Yet, any convention in that area must be situated within the following parameters. If an individual, company or State was carrying out a potentially dangerous activity, an accident occurred and, through nobody's fault, the property of an innocent bystander was damaged, the one person who clearly should not bear responsibility or suffer financial loss was the innocent bystander. That premise was the justification for the elaboration of any convention on the subject, which should be based on the principle sic utere tuo ut alienam non laedas. However, there was no reference to that principle anywhere in the Commission's report. As to who should bear responsibility, the answer, for practical reasons, pointed in the direction of the entity that was carrying out the activity. However, it had been agreed that the accident was nobody's fault, and it therefore followed that that entity could not be held responsible in any sense that implied culpability. For empirical reasons, therefore, the State in which the entity was located was the legal person which should take responsibility for the damage.

30. In that regard, he read out paragraphs 370 and 376 of the Commission's report and suggested that the time had come to limit the scope of the project. It was not a matter of compiling lists of dangerous substances, and even less of tackling the enormous problem of defining the environment. In other words, his delegation firmly believed that the draft convention was not concerned with the protection of the environment, which should be addressed by other instruments.

The Commission had made no attempt to define the meaning and scope of human life or the ever-changing concept of property.

31. The first priority should be the establishment of a legal mechanism which would prevent an innocent third party from having to bear a loss: a mechanism concerned not with the adjudication of fault liability but with the equitable distribution of financial loss. That objective must lie at the core of any examination of the subject. The Commission's task should therefore be to consider in depth what the real purpose of the draft convention was.

32. Mr. LEANZA (Italy), referring to the draft articles on State responsibility, said that the basic distinction between international delicts and international crimes was that whereas a delict was simply an ordinary illegal act, a crime consisted in the violation of obligations considered fundamental by the international community. The Commission had reflected that aspect of the development of modern international law.

33. His delegation did not share the criticism directed at the idea of international crime on the basis of the maxim societas delinquere non potest, according to which States were exempt from criminal responsibility and could not be punished. Closely linked to that criticism were others based on the fact that the international system lacked a body with the right of public prosecution or one having criminal jurisdiction. Those objections, however, were not unanswerable.

34. On the other hand, the fact that the Commission was also working on the draft Code of Crimes against the Peace and Security of Mankind did not mean that at the international level criminal responsibility was merely individual, since that very text stipulated that the prosecution of an individual did not relieve a State of responsibility.

35. As to the criticisms of an institutional nature, there was no denying that the international community did not constitute an organic structure and that therefore not only lawmaking but verification and coercion were functions directly exercised by States. In the case of the consequences of international State crimes, however, the Commission had chosen to weaken the normal mechanism of the inorganic structure of the international community, in the form of collective self-help.

36. In any case, the distinction between international delicts and international crimes made sense only if committing an international crime had specific consequences which were naturally related to the extreme gravity of the wrongful act. Following that line of thought the Special Rapporteur traced a logical distinction between substantive consequences and instrumental consequences and, within each of those categories, characterized some as special consequences and others as supplementary consequences.

37. His delegation was in agreement with the procedure proposed by the Special Rapporteur, according to which the General Assembly or the Security Council would carry out a political assessment of the situation, after which the International Court of Justice would decide whether or not an international crime had been committed. It would be a unique procedure in that it would make

full use of the opportunities afforded by the United Nations, respect the powers of the participating bodies and make possible a rapid response to an international crime.

38. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation supported a system of subsidiary liability of States for that portion of the damage not borne by whoever carried out the dangerous activity in question. It also supported the idea that such State liability should not be limited to cases in which the State had failed to show "due diligence" in preventing the damage, since that was essential for differentiating responsibility for lawful acts from responsibility for wrongful acts.

39. Bearing in mind that many national legal systems recognized the concept of environmental damage and that various international conventions protected the environment, his delegation considered it sensible to have included in the draft articles a clear and comprehensive definition of "harm". In that connection it believed that the draft should include a full definition of harm to the environment, taking account of the aesthetic and cultural value of natural resources and goods damaged as a result of a given dangerous activity.

40. The Special Rapporteur's report said nothing about the hypothetical case of transboundary harm caused in a place not under the sovereignty of any State, for example on the seabed, in Antarctica or in outer space. Since there were no international bodies administering such areas, the injured party should be held to be the international community and entitlement to sue for reparation should be vested in an international body or a State representing it. He agreed with the Special Rapporteur that the only appropriate means of compensation for environmental damage was restitutio naturalis, except where that was impossible, in which case monetary compensation would have to be provided.

41. Lastly, he agreed with the thrust of the four new articles provisionally adopted by the Commission, since they were in line with international practice with regard to the obligations of States towards activities undertaken in their territory, particularly draft articles A, B and D.

42. Mr. Lehmann (Denmark) resumed the Chair.

43. Mr. YAMADA (Japan) welcomed the Commission's progress in preparing the draft articles on State responsibility, but noted that several articles remained to be adopted and that the piecemeal submission of draft articles was not conducive to the work of the Sixth Committee. The draft articles presented a rather unrealistic system of responsibility based on the concept of civil responsibility and that of criminal responsibility. The international community did not in fact have a mechanism to determine whether an international crime had been committed or, if so, to enforce the responsibility of the offending State. All indications were that States were not ready for such a regime. In such circumstances the system could hardly work in practice.

44. The question of "aggression", recognized as a State crime in the draft articles, was an example of the many problems that arose, beginning with the question of what punishment could be imposed on a State that had perpetrated an

offence. There was invariably a problem connected with national sovereignty and the territorial integrity of States. That dilemma originated in draft article 19 of part one, which dealt with the concept of State crime, on which many Governments had expressed reservations. He hoped that the Commission would approach the problem from a realistic perspective, taking into account the current state of organization of the international community and the positions of Governments.

45. His delegation welcomed draft article 13, on the principle of proportionality, and draft article 14, on prohibited countermeasures, since they sought to prevent the arbitrariness of unilateral countermeasures by the victim State. The wording of article 13 did not, however, resolve the problem of how the standards of judgment for proportionality should be considered. Article 14, after all, prohibited "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act", while article 13 stated clearly that such measures would not be permitted. The article was redundant unless it could be seen as establishing a new interpretation of the controversial word "force" in, Article 2, paragraph 4, of the Charter of the United Nations.

46. He welcomed the fact that part three, on the settlement of disputes, covered not only the problem of countermeasures, but also the problem of the interpretation and application of the draft articles in parts one and two. He was glad that it provided a system based on negotiation, good offices and mediation, conciliation, arbitration and recourse to the International Court of Justice. Draft article 5, paragraph 2, however, stipulating the compulsory establishment of an arbitral tribunal for disputes relating to countermeasures, deserved greater attention for a number of reasons: to date, such tribunals had always developed on the basis of an agreement between the parties concerned; disputes about countermeasures could easily escalate into major diplomatic conflicts; it was not clear whether the latest proposal was or was not similar to the provision in article 66(a) of the Vienna Convention on the Law of Treaties; and such a method of settling disputes would be criticized as a violation of the freedom of choice in selecting means of settling disputes, which might make it difficult to achieve broad acceptance for part three. In any case, further consideration should be given to the relationship between the dispute settlement procedures described in the draft articles and the procedures set out in other international instruments.

47. Mr. PFIRTER (Observer for Switzerland), referring to the draft articles on State responsibility, said that article 13 codified the principle of proportionality of reprisals on the basis of the concept of proportionality by approximation recognized by contemporary judicial practice, including the International Court of Justice award in the Air Services Agreement case between the United States and France. It followed from the criteria established in that article for assessment of the proportionality of countermeasures, namely the gravity of the wrongful act and its effects on the injured State, that a wrongful act of a certain gravity did not necessarily inflict major damage, and vice versa. Switzerland supported that flexible and nuanced approach as well as the explanations given in paragraphs 8 and 9 of the commentary, which stated that the effects of the wrongful act on the injured State should not be

interpreted to rule out the taking of countermeasures in respect of the violation of obligations erga omnes.

48. Article 14 contained a list of prohibited countermeasures, including extreme coercion designed to endanger the territorial integrity or political independence of the State that had committed an internationally wrongful act, in other words measures of "intervention". The inclusion in the draft of the idea on which that restriction was based was no doubt justified, but its application could present considerable difficulties, particularly in determining the threshold beyond which an "intervention" was to be viewed as endangering a State's "political independence".

49. With regard to the settlement of disputes by peaceful means, the draft proposed two settlement procedures: one for situations in which countermeasures had been taken and the other for disputes concerning interpretation or application of the draft articles.

50. With regard to the first procedure, the existing version of article 5, paragraph 2, provided for compulsory arbitration for a dispute concerning responsibility where two conditions were met: that the State which committed the wrongful act had been the subject of countermeasures and that the same State had initiated the arbitral proceedings. He failed to understand why the provision gave preference to certain disputes and certain States instead of extending the compulsory arbitration to all disputes regarding the interpretation or application of the draft articles.

51. With regard to the other means of settlement of disputes between States, he noted that, despite the apparent limitation imposed by the wording "dispute regarding the interpretation or application of the present draft articles" used in article 1, the procedure would in practice be extended to all disputes between States parties where the international responsibility of either party was in dispute. Moreover, although the draft articles established a binding conciliation regime, there was no provision for compulsory arbitration, which was very unfortunate in view of the content of the disputes in question.

52. Reviewing part three of the draft, article by article, he said that no comment was necessary on article 1.

53. With regard to article 2, concerning good offices and mediation, he failed to understand why the possibility of tendering good offices or offering to mediate was limited to States parties in the future convention instead of being extended to all members of the international community.

54. With regard to article 3, concerning conciliation, his Government was in agreement provided that it was supplemented by a jurisdictional procedure that could be initiated unilaterally and whose results were binding. It also supported the idea of the parties being free to waive conciliation and proceed directly to the initiation of an arbitral proceeding. On the other hand, it considered that the period of three months fixed for negotiations should be extended to six.

55. With regard to article 4, concerning the task of the conciliation commission, he considered that the period of three months allowed for presentation of its report was unrealistic. It would be enough to have the conciliation commission establish its own procedure with which the parties would be obliged to cooperate.

56. Article 5, concerning arbitration, was the most controversial. In addition to his previous observation of a fundamental nature, he wished to make two procedural comments. First, paragraph 1 of article 5 should spell out the provision suggested in article 3, namely that the parties could, by common consent, proceed to arbitration without passing through conciliation. Second, there was no reason to impose on the parties a six-month settlement period after submission of the conciliation commission's report; it should be stipulated instead that the arbitral proceedings could only begin on expiry of the period in which the parties responded to the recommendations made in the report, a period to be fixed by the conciliation commission in accordance with article 4, paragraph 4.

57. With regard to article 6, concerning the terms of reference of the arbitral tribunal, he proposed that the period of six months should be calculated from the date of completion by the parties of the oral procedure rather than from the date of completion of their written and oral pleadings and submissions. He also proposed deleting paragraph 2, since the entitlement it conferred on the tribunal to determine the facts of the case derived from the entitlement to decide "with binding effect any issues of fact or law which may be in dispute" conferred in paragraph 1.

58. Article 7, concerning the validity of an arbitral award, contained a paradox inasmuch as the jurisdictional regime for which it provided would, in principle, be optional whereas the procedure for determining the validity of its practical findings would be binding. That pointed to the desirability of establishing a generalized binding arbitration procedure for the purpose. In addition, he wondered why the article failed to provide for interpretation and review of arbitral awards.

59. In conclusion, he said that his Government was in general agreement with articles 13 and 14 of part two of the draft but that the existing provisions of the instrument concerning the settlement of disputes fell far short of its expectations.

60. Mr. JALBANI (Pakistan), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that experience had shown that terrorism occurred in various forms, the worst of which was perhaps "State terrorism"; he therefore suggested that the reference to "international terrorism" should be re-examined. He also felt that some of the crimes that had been eliminated deserved to be included in the Code, such as those relating to mercenaries and to colonial domination and other forms of alien domination.

61. He pointed out that members of the International Law Commission should guard against having the concepts being developed by them conflict with States' interests or impinge on the sovereignty of States, for that would be an obstacle to universal acceptance of the Code.

62. He felt that the question of reservations had been adequately dealt with in the Vienna Convention on the Law of Treaties, the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. He supported the views of the United States and the United Kingdom that treaties should not establish different regimes concerning reservations and, like them, rejected the view that reservations should not apply to human rights treaties.

63. Mr. WIRANA (Indonesia), referring to the draft Code of Crimes against the Peace and Security of Mankind, agreed that the Commission should coordinate its work in that area with that being done on the draft statute for an international criminal court. According to the principle nullum crimen, nulla poena sine lege, it was important that the Code should contain precise definitions of crimes. He believed that it should contain only those crimes that posed a serious and imminent threat to international peace and security and deemed it important that it should include apartheid, as institutionalized racial discrimination.

64. Regarding the character of aggression and the determination of its existence by the Security Council, it was important to differentiate between the functions of the Council and those of a judicial body in assessing the criminal responsibility of individuals; indeed, the Council had no jurisdiction over the accused. Provisions relative to penalties should be consistent with those of the draft statute for an international criminal court.

65. On the issue of State succession and its impact on the nationality of natural and legal persons, it would be useful if the Commission established guidelines on certain questions raised concerning the obligations of successor and predecessor States to resolve problems of nationality. State practice and national legislation in that field should be examined. In addition to the need, indicated by the report, to distinguish between the nationality of natural and that of legal persons, the concept of nationality should be defined according to whether the problem arose through international law or national law. In many instances, individuals were not subjects of international law, and internal law included different categories of nationality. He recalled that in the area of nationality, limitations on freedom had been clarified in the decision rendered by the International Court of Justice in the Nottebohm case.

66. On the subject of State responsibility, he was gratified that the Commission had resolved some key aspects, including the legal consequences of wrongful acts characterized as crimes and the settlement of disputes in that area. Nevertheless, article 19 raised problems, inasmuch as the General Assembly and the Security Council were political bodies and it would be inappropriate for them to exercise a de facto judicial function. Furthermore, those bodies were not authorized by the Charter to exercise jurisdiction over crimes. Such an approach was also inconsistent with Article 12 of the Charter and entailed the risk of conflict between the two organs. Also, the role assigned to the International Court of Justice raised the problem of its compulsory jurisdiction and the lack of independent fact-finding mechanisms. The possibility of other approaches, such as the creation of an ad hoc

jurisdictional body, resort to arbitration or the granting of jurisdiction to an international criminal court, merited further consideration.

67. He pointed out that the population of developing countries might be seriously affected by actions taken against their States, whence the need for further clarification of the phrase "vital needs of the population" appearing in draft article 16.

68. His delegation commended the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law as well as on law and practice relating to treaties. In that regard, it would be useful to examine State practice concerning the problems posed by reservations. Indonesia also supported mutually beneficial cooperation between the Commission and other bodies, particularly the Asian-African Legal Consultative Committee.

69. Mr. MAPANGO (Zaire) wished to make a few remarks concerning the draft Code of Crimes against the Peace and Security of Mankind, reserving the right to refer subsequently to its chapters IV and V.

70. Considering the principle nullum crimen sine lege, he could not accept the selective criterion adopted by the Special Rapporteur for the exclusion of certain crimes from the Code. Those crimes were as political and debatable as the other six maintained in the draft.

71. It had been asserted that some of the crimes excluded, such as intervention and colonial domination and other forms of alien domination were already covered by conventions or General Assembly declarations. But the legal instruments in force should serve as working documents to enable the Commission to continue its work of codification and progressive development of international law. It had also been said that odious crimes such as apartheid and colonial domination should not figure in the Code of Crimes because they had disappeared. Recent scientific progress, however, had led to the opposite conclusion, and it was known, for example, that the exploitation of new sources of wealth would be reserved for a few countries having the requisite financial and technical resources.

72. Also, the minimalist delegations had argued that a code containing more crimes than those that had been retained would become a dead letter and would never be applied. His delegation considered that a code comprising only a limited number of crimes might prefigure a world in which the rich would grow steadily richer and the poor, poorer.

73. Along the same lines, the minimalist tendency sought to eliminate the link that must exist between the Code of Crimes and the proposed international criminal court. The speaker drew that attempt to the attention of the countries of the third world, since there was still time to reject it. What was being attempted was to eliminate the criminal responsibility of the State and admit solely that of individuals.

74. His delegation aspired to a world governed by the force of law, not by the law of force. It therefore subscribed to the maximalist tendency, with an eye to a Code that would have not only a repressive value, but a dissuasive value. As for the form of the Code, his delegation favoured the convening, at the appropriate time, of a conference of plenipotentiaries with a view to the adoption of an international convention on the subject.

The meeting rose at 1.10 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
19th meeting
held on
Friday, 20 October 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 19th MEETING

Chairman:	Mr. LEHMANN	(Denmark)
later:	Mr. BELLOUKI (Vice-Chairman)	(Morocco)
later:	Mr. LEHMANN (Chairman)	(Denmark)

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AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10, A/50/402)

1. Mr. SYARGEEU (Belarus) said that, while endorsing the idea that the Code of Crimes against the Peace and Security of Mankind should include only the most serious crimes, he felt that the proposed reduction was too drastic. He was particularly concerned about the possible exclusion of wilful and severe damage to the environment: in the case of the Chernobyl catastrophe, there had been a violation of the most sacred of human rights, the right to life. For that reason, he supported the suggestion of establishing a working group responsible for preparing a suitable text on the topic.

2. With regard to the penalties applicable to crimes, he favoured the elaboration of a general article to specify maximum and minimum penalties applicable to each crime and possible mitigating circumstances, and the deletion of the provisions on penalties from the other articles of the Code.

3. He expressed his satisfaction with the fact that the definition process had excluded involvement of a State in the commission of crimes. He was particularly pleased that the new definition of international terrorism took into account the fact that the peace and security of mankind could be threatened by acts committed by organizations or groups which were not necessarily affiliated with a State. Finally, he was confident that the elaboration of the statute of an international criminal court would expedite adoption of the draft Code.

4. Mr. Bellouki (Morocco), Vice-Chairman, took the Chair.

5. Mr. OBEID (Syrian Arab Republic), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that he would prefer the crimes to be defined more clearly in order to avoid future problems of interpretation. It was not necessary to state that the crimes dealt with were those of international law since, when the Code was eventually approved, the crimes to which it referred would become part of international criminal law. He favoured the view that the definitions should be precise, rather than conceptual, in order to avert interpretations which would exclude certain crimes.

6. With regard to article 5, he shared the idea of broadening the area of responsibility to include not only individuals but also the State responsible for them.

7. He would welcome a clearer definition of extradition and requests for extradition in article 6. When an international criminal court was established, the current wording of that provision might be dispensed with. In his opinion, the seriousness of the crimes envisaged in the Code justified their imprescriptibility.

8. Referring to article 8, he said that there must be due judicial guarantees to ensure that the trial took place before an impartial tribunal.

9. With regard to article 15, he said that aggression would have to be clearly defined. The final decision on the matter should be taken, not by a political body such as the Security Council, but by a legal body.

10. The draft enumerated other serious crimes. However, the occupation of territories, the establishment of settlements and the displacement and persecution of indigenous peoples were additional current examples of blatant violations of human rights.

11. The question of reducing the number of crimes included in the Code must be examined at greater length, since all of those crimes constituted serious offences against the human conscience and threats to the peace and security of mankind. His delegation reserved the right to return to the question and to suggest the inclusion of other crimes so that the list would not be incomplete.

12. The concept of jus cogens might hinder the creation of an international criminal court for trying individuals or States. The compulsory jurisdiction of that court should not be limited to States parties to the statute, since limiting it to those States would not protect mankind against the crimes covered. If the sentences were limited to parties to the statute, only citizens of States which had acceded to the convention would be punished. The system would break down, since the international criminal court would not be able to judge all crimes against mankind.

13. The close links which existed between the international criminal court and the United Nations had not been clearly defined. In practice, that court would be a body established by States parties to a treaty rather than a body created by the General Assembly which represented all the peoples of the world.

14. Ms. LADGHAM (Tunisia) said that it was necessary to increase efforts to complete the Code of Crimes against the Peace and Security of Mankind. It was extremely important to coordinate work on the Code with work on the statute of an international criminal court, since the two instruments would be complementary, and it would be necessary to ensure the harmonization of their provisions.

15. With regard to the competence ratione materiae of the Code, the possibility of reincorporating some of the deleted crimes, such as apartheid, should be considered. The deletion of the paragraphs referring to the Security Council from article 15, on aggression, was appropriate, since a political body should not impede the function of a judicial body. For that reason, she disagreed with the idea of relying on the Security Council's definition of aggression rather than defining it in the Code; on the contrary, it would be useful to enumerate the acts which constituted aggression.

16. The proposal of the Special Rapporteur to replace the title "Systematic or mass violations of human rights" by "Crimes against humanity" might give rise to confusion, since all of the crimes defined in the Code would be crimes against mankind. It was important to indicate that the article dealt with massive and systematic violations, since the idea was that violations alone were an international crime when they were carried out on a certain scale.

17. Moreover, bearing in mind the events in Bosnia and Herzegovina, the Code should also include the crime of rape. The International Law Commission should give the same priority to the crime of international terrorism as to the other crimes, and article 24 was a good point of departure for doing so.

18. The Code should not only define crimes with precision but also enumerate the applicable penalties. Despite the reluctance of some Governments in that regard, the Commission should give priority to studying the matter. It was largely a question of the link to be established between the Code and the international criminal court.

19. In order to achieve its aims of preventing and punishing crimes against the peace and security of mankind, the Code should be binding.

20. Miss CHATOOR (Trinidad and Tobago), referring to article 1 of the draft Code, said that the definition could be based on the seriousness of the crimes concerned, the fact that they were a threat to the established legal order, and their transboundary nature.

21. Article 3, which should be worded in general terms, should refer to the principle of individual criminal responsibility. The Code should include a general provision on penalties. On the question of aggression, the definition left out the legal elements which distinguished aggression from other acts. The question of aggression and the role of the Security Council had serious political connotations, and it might therefore be useful to harmonize the approach pursued by the Commission with that of the debate on the draft statute for an international criminal court. In view of the difficulties associated with the concept of intervention, her delegation supported the proposal that it should be included as an element in determining that aggression had occurred.

22. Colonial domination and other forms of alien domination was one of the concepts which could not be defined easily or precisely for criminal law purposes. Her delegation proposed that the Commission should study the views of members of the Committee and reconsider the proposal for article 18 to be excluded.

23. Her delegation felt that genocide should be defined on the basis of the 1948 Convention, the provisions of which had been accepted by the international community and reflected customary international law.

24. Her delegation did not agree that the crime of apartheid should be excluded from the list, since apartheid could resurface. As to the inclusion in the Code of "institutionalized racial discrimination", an acceptable definition of that crime had to be drafted.

25. With regard to systematic or mass violations of human rights, in order for such acts to be punishable by an international criminal court, it had to be proved not only that they were systematic and conducted on a massive scale, but also that they were of an exceptional nature. It was not necessary for torture to be included in the list; it would be enough to include a descriptive list in a commentary or in an article or section on interpretation.

26. The Code should include the activities of mercenaries, not only because they posed a threat to peace and stability, but also because certain criminal activities such as trafficking in drugs, people and arms and terrorism were related to the recruitment of mercenaries. As to international terrorism, the new text of article 24 could serve as a basis for further consideration.

27. Her delegation felt that for illicit traffic in narcotic drugs to be the subject of international criminal jurisdiction it must be on a large scale, transboundary in nature and pose a serious threat to the established institutions in a State or region. The provision in the Code should cover not only individuals but also State agents or representatives.

28. In view of the ongoing damage being done to the environment, the Commission should give further consideration to the possibility of including in the Code the crime of wilful and severe damage to the environment. The Code should also contain a general provision on penalties. As far as possible, it should provide for the maximum penalty of life imprisonment and leave the international criminal court to determine other terms, depending on the circumstances of each case.

29. Mrs. BOUM (Cameroon), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that her delegation was not in favour of the restrictive approach taken by the Special Rapporteur of excluding from the draft Code serious crimes such as intervention, colonialism, apartheid, mercenarism and international terrorism. The seriousness of the offence was the basic criterion for the formulation of the list of crimes to be included in the Code. With regard to colonialism, she said that as a result of the adoption by the General Assembly, in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples, that crime had entered the domain of jus cogens. The need to include the crime was, therefore, evident. The argument that it was a phenomenon of the past was not convincing.

30. Her delegation was concerned that the Commission had undertaken to conclude the second reading of the draft Code at its next session, in view of the many problems that still remained. Cameroon hoped that the results of the difficult work entrusted to the Commission would meet the expectations of the international community.

31. Mr. AL-ADHAMI (Iraq), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that his delegation deplored the restrictive approach taken by the Special Rapporteur in excluding 6 crimes from the original list of 12. There was no justification for the exclusion of crimes as serious as, for example, intervention in the internal or external affairs of a State and colonial domination.

32. The Special Rapporteur had proposed a new text for the article on aggression. That article defined the crime of aggression and provided for individual criminal responsibility. However, it would be difficult to put into practice the principle of the independence of judicial authorities which should be the basis for those provisions.

33. The new text of article 22 was a significant improvement compared to the previous text, although the formulation was not ideal. Paragraph 2 (b), referring to the establishment of settlers in an occupied territory, had been omitted. Moreover, some offences which did not seem to be serious enough to be considered war crimes had been included, such as those mentioned in paragraph 1 (f) and (g). Lastly, the expression "inhuman treatment" used in paragraph 1 (b) should be made more specific.

34. Mr. MIKULKA (Czech Republic), referring to the topic of State responsibility, said the concept of "international crime" was not new, and its inclusion in article 19 was not attributable to the current Commission, whose mandate was limited to considering the consequences of internationally wrongful acts, including crimes in the sense of article 19. The distinction between an international delict and an international crime was based on the hypothesis that there were differences between the regimes of responsibility applicable to each category.

35. His delegation believed that, until the question of the consequences of wrongful acts had been fully considered, the debate on article 19 should not be reopened. It agreed that, in international law, State responsibility was neither civil nor criminal, but international in nature. If, in that context, it was considered that wrongful acts which threatened the fundamental interests of the international community did not have special consequences compared with "ordinary" wrongful acts, that would amount to recognizing that the concept of the fundamental interests of the international community was not legal but political in nature.

36. Internationally wrongful acts defined, rightly or wrongly, as "crimes" consisted of particularly serious violations of primary norms of international law of an imperative nature (jus cogens). The consequences of international crimes were governed by secondary norms which, consequently, should also be imperative.

37. His delegation shared the view of the Special Rapporteur that the obligation of cessation in the case of a crime was identical to the obligation to cessation in the case of an offence resulting from non-fulfilment of erga omnes obligations. However, it felt that the question of whether or not articles 7 and 8 of part two were applicable to crimes should be considered in greater depth, since it was not clear that, in the case of violation of an imperative norm of international law, the injured State could freely choose between compensation and restitution in kind. Indeed, the freedom to choose could be incompatible with the prohibition on derogating from an imperative norm by agreement among States. If that were so, it would have to be concluded that compensation was admissible only when restitution was materially impossible. His delegation also shared the view of the Special Rapporteur that article 7 (c) and (d) of part two should not be applicable in the case of crimes. When State crimes were committed, the injured party was the international community as a whole, so that restitution must not be subject to more limitations than those necessary to preserve the existence of the wrongdoing State and meet the vital needs of the population.

38. His delegation was mindful that the lack of a mechanism to determine, in the absence of aggression, whether or not a crime had been committed could make it more difficult to determine the consequences of international crimes. Nevertheless, he wondered whether that was sufficient reason not to spell out the consequences of the other wrongful acts which were detrimental to the fundamental interests of the international community and not to examine the possibility of establishing a mechanism of that nature, especially since a regime of liability for crimes could hardly be viable if an appropriate mechanism for its implementation was not established.

39. With regard to the "instrumental" consequences of crimes, the collective response of the international community should take precedence over the countermeasures of individual States, and the Commission should consider the question of whether "special" and "supplementary" consequences could arise from an actio popularis or, on the contrary, only from an actio communis carried out by the international community.

40. With regard to proportionality, all crimes affected the community of States to a greater or lesser degree, and therefore the principle of proportionality should be applied by each State individually. In any case, subparagraphs (a) and (b) of article 14 were superfluous, since the exercise of the right of self-defence and the measures taken by the Security Council did not constitute countermeasures.

41. There was every indication that the process of institutionalization of joint action aimed at enforcing liability for wrongful acts constituting a breach of fundamental international obligations would be a slow one. However that might be, the possibility that the mechanism provided for in article 19 of Part Two would function was remote. Consequently, the Commission should limit itself to an enunciation of general principles which would ensure that the question of fulfilment of specific and substantial obligations arising from international crimes remained within the exclusive competence of a mechanism established by the international community.

42. Finally, his delegation joined those others which had expressed support for the inclusion in the draft articles of optional mechanisms for the settlement of disputes.

43. Mr. HALFF (Netherlands), speaking on the topic of State responsibility, said that he agreed with the approach proposed by the Special Rapporteur in respect of crimes, namely, to distinguish between special consequences, in the form of aggravated forms of consequences provided for in articles 6 to 14 for delicts, and supplementary consequences in the form of new consequences. He further agreed that those consequences should be regarded as additional to those arising from articles 6 to 14. It must therefore be assumed that the legal consequences envisaged for international delicts under those articles could also be invoked by the injured States in the case of international crimes.

44. His delegation was satisfied with the proposed new article 7 and with articles 13 and 14 and their respective commentaries, as well as with articles 1 to 7 of Part Three and the annex thereto, *with its commentary*. It would have preferred, however, to also see compulsory arbitration in the situations

referred to in article 5 (1). Moreover, the commentary on article 6 (2) that the parties to the dispute were not obliged to permit fact-finding within their territory had no basis in the text of that article.

45. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation largely agreed with the text of draft articles A to D. It also agreed that the general obligation to prevent or minimize the risk of causing transboundary harm provided for in article A was an implicit consequence of the obligation not to cause transboundary harm and that it provided a clear foundation for other obligations relating to prevention. It shared the Commission's view that the general obligation laid down in article B was not an obligation of result but one of due diligence, and it basically agreed with the interpretation given by the Commission to the standard of due diligence.

46. Article C dealt with a question which could not be avoided in the draft articles. The Netherlands had always supported the view that the activities referred to in article 1 might involve no-fault liability and give rise to an obligation of reparation. He wished to refer to the statement made by the Netherlands on that subject at the forty-ninth session of the General Assembly. The Netherlands further supported the basic obligation laid down in article D. The drafting of the article was not entirely satisfactory, however, since it was difficult to see how a State of origin could be obliged to cooperate in minimizing the effects produced in its own territory by the infliction of transboundary harm. Moreover, certain of the reasons given in the commentary for seeking, "as necessary", the assistance of international organizations were not entirely appropriate. Finally, his delegation wished to express its appreciation for the valuable updated survey of liability regimes contained in document A/CN.4/471.

47. Mr. de SARAM (Sri Lanka) expressed concern at the criticisms of the Commission's methods of work and suggested that the Sixth Committee should consider those criticisms, perhaps during informal consultations, before the conclusion of its debate on the topic under consideration. In fact, some of those criticisms were inspired by legitimate concerns, particularly because the Committee did not always issue clear guidelines to the Commission when requesting it to prepare draft articles on specific topics.

48. Referring to the draft articles on State responsibility, it was unfortunate that the concept of "State crimes" had been introduced into the articles. The concept was at best questionable in light of the principles underlying international law, such as the sovereign equality of States, and was also heavy with criminal law connotations and moral implications and conveyed the impression that where there was crime there should also be punishment, a consideration which tended to confuse things. It was, moreover, inappropriate, since the purpose of the draft articles was not to punish but to compensate for breaches of international obligations. In any case, the institutions and procedures necessary to implement that concept were not yet in place. Moreover, to put them in place would require amendment of the fundamental provisions of the Charter, a task that was difficult, if not impossible, at the current time.

49. There was no doubt that that school of doctrinal thought, part of which believed that some breaches of international obligations were of such magnitude as to be in the nature of a crime, had made an important contribution to the development of public international law. Nevertheless, if the subject of State crimes again burdened its work the following year, the Commission would be unable to complete the draft articles, which would be unfortunate. The Sixth Committee should therefore give precise directions to the Commission on the matter.

50. On the question of the peaceful settlement of disputes, the approach adopted by the Commission in its draft articles on State responsibility was very flexible and as consensual as possible, though it stopped short of leaving the entire question out of the draft articles, making it instead an optional protocol or making no mention of it at all.

51. That approach had two main drawbacks. Firstly, many of the substantive provisions of the draft articles, namely, part one and part two, were necessarily imprecise and therefore open to differing interpretations. All in all, it would be illogical to leave them as they were, without defining dispute settlement procedures. Secondly, since in any dispute there was a stronger and a weaker party, the provisions for entrusting the decision to a third party in cases where the parties did not reach agreement were reasonable. They did, however, seem too elaborate; he believed that there should be only three conciliators and three arbitrators, especially in the light of the high fees that they charged. In some respects, therefore, the proposals made by the Commission appeared more appropriate for bigger disputes than for smaller ones.

52. Furthermore, he considered the provisions concerning fact-finding to be inappropriate, since they mentioned only fact-finding within the territory of one State and failed to specify the other formulas available.

53. However, he agreed with paragraph 2 of article 5, which entitled the State against which countermeasures had been taken to submit the dispute to an arbitral tribunal.

54. One of the fundamental questions of contemporary international law with regard to State responsibility was that of material transboundary harm. It was an area in which judicial and arbitral jurisprudence was sparse and all treaty negotiations had given rise to difficulties, except in the case of the Convention on International Liability for Damage Caused by Space Objects. If Governments had not shown the will to resolve those difficulties, it was because, should they agree to be bound by treaties or other formulas, they would probably have to accept exorbitant financial liabilities, given the potentially catastrophic proportions of the transboundary harm that such objects could cause. Thus, treaties and international custom in the field of transboundary harm had not developed in line with reality. The stagnation of the Commission's discussions on the subject might be due to its awareness of the major repercussions that any decision would have in respect of both codification and the progressive development of law in that area.

55. He considered that the principle of due diligence had lapsed, given that, in practice, it imposed upon the claimant State a burden of proof which was

almost unattainable in a highly industrialized world. The matter might be resolved if a case of alleged transboundary harm was submitted to arbitration or judicial decision. As a last resort, the General Assembly could be asked to request an advisory opinion from the International Court of Justice; it would, however, be extremely difficult for the General Assembly to agree to a solution of that type.

56. Lastly, his delegation recommended to the Commission that, before preparing draft articles on material transboundary harm, it should prepare a list of the legal problems involved and possible solutions. The Commission could neither adopt a final decision on the subject solely on the basis of general principles of law nor draft a general set of rules on matters in which it had insufficient technical competence by relying almost entirely on the model of European treaties, which were not applicable on the world-wide scale.

57. Mr. S. R. RAO (India) said that the problem of countermeasures in general and the concept of crime in particular had to be seen in the context of the practice of countermeasures. The practice of a claimant State acting as a judge in its own cause was suspect, and for that reason should be restricted carefully. It was important that States should not be allowed to take the law into their own hands.

58. The difficulty with the concept of State crime was that in the current world order, there were no ground rules for determining violations or institutions for making objective and impartial determinations of grave wrongs or crimes. Further, linking the concept of crime to the notion of "differently injured States", enabling such States to react to the crime in question, could pose a severe threat to world peace and security.

59. To the extent that the consequences of State crime involved measures such as disarmament and the dismantling of war industries, those consequences were suitable only in the case of a crime of aggression and, additionally, as part of an obligation imposed upon the vanquished by the victor or under a mechanism of sanctions created under Chapter VII of the Charter. Accordingly, such obligations could not be implemented either as self-enforceable obligations under international law or as sanctions. Also, his delegation did not agree with the idea of requiring States to accept fact-finding missions within their territory.

60. Regarding article 13, dealing with proportionality, his delegation accepted in principle the terms in which it was drafted, as well as the commentary; but it could not agree that no exception should be made when it came to the adoption of countermeasures in the case of violations of human rights and of erga omnes obligations, as recommended in the commentary on the evaluation of the degree of gravity of the wrongful act and of its effects. India considered that human rights and erga omnes obligations should be governed by their own regimes and could not be automatically brought under the law of State responsibility.

61. In respect of the conditions to be met for the application of countermeasures, he agreed in principle with the normative character of article 14, paragraphs (a), (c), and (d), but considered that paragraph (b) should be discussed in detail to arrive at a more precise formulation based on

the practice and interests of States, particularly the interests of the developing countries, which were not in a position to tolerate even the slightest economic or political coercion.

62. It was highly unlikely, in most cases, that the reference in article 14 (e) to the peremptory norms of general international law would serve to identify them; those norms would therefore continue to be a matter of preference rather than a matter of evidence based on State practice.

63. In respect of the question of the settlement of disputes, rather than the proposed system, which involved the creation of a compulsory third party settlement procedure, his delegation would prefer a more flexible procedure, designed to prevent abuses in the use of countermeasures. However, it would not be a realistic, acceptable alternative in the absence of universally recognized principles of international law and of objective and impartial forums. Given the decentralized system of sanctions in contemporary world society, the disadvantages of any system of jurisdiction not willingly and voluntarily accepted were obvious. In addition, it was most unlikely that any settlement of a dispute would be viable or lasting if it was perceived to have been imposed. His delegation therefore maintained its reservation on that subject.

64. Mr. Lehmann (Denmark) resumed the Chair.

65. Mr. P. S. RAO (Chairman of the International Law Commission), introducing chapters III, VI and VII of the report of the Commission, referred firstly to the issue of State succession. In his first report on the subject, the Special Rapporteur, Mr. Mikulka, had taken as his basic premise that, while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States, including the principle of effective nationality and human rights law. He had stressed the need to distinguish clearly between the nationality of natural persons and that of legal persons and had emphasized that the effects of State succession on the nationality of each should be studied separately, the problem of natural persons being the most urgent.

66. According to the Special Rapporteur, ratione materiae, the Commission should consider the obligations of States in respect of the withdrawal and attribution of nationality, as well as the right of option. Ratione temporis, he had proposed that it should pay attention to the problems which could arise before the successor State had adopted laws on nationality. He had also proposed that the Commission should consider whether the rule of continuity of nationality, which essentially arose in the context of diplomatic protection, should apply in the context of State succession.

67. In the course of the Commission's debate, the idea of elaborating a treaty had been eliminated, on the ground that it was a lengthy process not responsive to the present and pressing needs of certain States. It had been suggested that the Commission should draw up a list of principles which could be incorporated in agreements between States, or that it should focus on general factors or criteria which States would be free to adapt to specific cases. The possibility was also considered of establishing a series of presumptions, such as the

presumption that every person had the right to a nationality and that no person should become stateless as a result of State succession.

68. A working group chaired by the Special Rapporteur had undertaken a closer examination of the obligation of States to negotiate in order to resolve any nationality problems that might have arisen as a result of State succession. A number of preliminary conclusions had been reached. The Working Group's point of departure had been that, in situations resulting from State succession, every person affected by the change had a right to a nationality, and that States were required to prevent statelessness. The Working Group had recommended that negotiations between States should address not only the problem of statelessness, but also other issues related to the loss and acquisition of nationality, such as entitlement to pensions and other social security benefits, separation of families and military obligations.

69. The Working Group had classified the various types of State succession in three categories: secession, unification and dissolution. In each of those instances, it had examined the rights and obligations of predecessor and successor States with regard to a number of categories of persons classified according to criteria such as place of birth, mode of acquisition of nationality and place of residence. The Group had also considered the question of the right of option and had concluded that the will of the individual was a consideration which, with the development of human rights law, had become paramount. Accordingly, it had suggested that, under certain circumstances, the right of option should be recognized.

70. As to the applicability of other criteria to the withdrawal and grant of nationality, the Working Group had agreed that, while withdrawal of, or refusal to grant, a specific nationality in the context of a State succession should not rest on ethnic, religious, cultural or other criteria, a successor State should be allowed to take such criteria into account for enlarging the circle of individuals entitled to acquire its nationality.

71. In connection with section 5 of its report, concerning the consequences of non-compliance with the principles applicable to the withdrawal or the grant of nationality, the Working Group had formulated certain preliminary hypotheses. In connection with section 6, it considered that the rule of continuity should not be applied in the context of State succession. In general the International Law Commission had noted with appreciation the report of the Working Group .

72. With reference to chapter VI of the Commission's report, dealing with the law and practice relating to reservations to treaties, he drew attention to the conclusions of the Commission's discussions and urged States to complete promptly the questionnaire that they would be receiving from the Special Rapporteur, through the Secretariat. The conclusions included a recommendation that the title of the topic should be amended to read "Reservations to treaties".

73. In introducing chapter VII of the Commission's report, "Other decisions and conclusions of the Commission", he described the planning of activities for the remainder of the current quinquennium. The Commission had decided to include the topic of "Diplomatic protection" in the agenda of its long-term programme of

work. It also planned to take up the complex, substantive subject of international environmental law, for which purpose it wished to be authorized, as a first step, to conduct an extensive feasibility study of rights and duties of States for the protection of the environment, so that it would be in a position to recommend to the General Assembly the exact scope and content of the future topic. In addition, the Commission had considered various matters based on the recommendations of its Planning Group, particularly the need to improve its working methods for preparing draft articles. Given its heavy agenda, the Commission had again strongly recommended that the next session should be of 12 weeks' duration, as in previous years.

74. With regard to cooperation with other bodies, the Commission attached great importance to maintaining its links with the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Judicial Committee. On the subject of the International Law Seminar, which was funded by voluntary contributions to the United Nations Trust Fund for the International Law Seminar, the Commission had noted with particular appreciation that the Governments of Austria, Denmark, Finland, France, Germany, Ireland, Norway, Switzerland and the United Kingdom had made voluntary contributions to the Fund and had emphasized the importance of the Seminar, which enabled young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations with headquarters in Geneva. As all available funds were exhausted, the Commission had recommended that the General Assembly should again appeal to States to make the voluntary contributions that were needed to hold the Seminar in 1996 with as broad a participation as possible.

The meeting rose at 1.05 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
20th meeting
held on
Friday, 20 October 1995
at 3 p.m.
New York

SUMMARY RECORD OF THE 20th MEETING

Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. RODRIGUEZ-CEDEÑO (Venezuela) welcomed the significant progress made by the Commission in its deliberations on the question of State responsibility and said that its work on the topic was innovative. As was the case for all rules of law, the regime of State responsibility must be adapted to the realities of international society. His delegation agreed that it was necessary to proceed very cautiously when attempting to draw a distinction between delicts and crimes in terms of their gravity, their underlying features and their consequences. The word "crime" described a grave breach by a State of a fundamental norm safeguarding the interests of the international community, which was difficult to define with precision. In his delegation's view, State responsibility for wrongful acts should be limited to delicts, meaning violations of international law the gravity of which did not affect the interests of mankind. His delegation could not agree that States could be held liable for an international crime, which would require the establishment of a regime different from that applicable to responsibility for internationally wrongful acts.

2. His delegation had reservations regarding the concept of countermeasures, since such unilateral acts could interfere with the exercise by certain international organs of their mandate to consider and resolve international disputes. The draft articles should delineate clearly all matters relating to the right to resort to countermeasures, the circumstances in which that right could be exercised and prohibited countermeasures. The right of the injured State to take such measures must be neither unlimited nor general in nature and must be in proportion to the effect of the wrongful act or of the damage caused. Particularly where crimes were concerned, certain conditions also must be met. An internationally wrongful act must have been committed, the cessation of the act or reparations therefor must have been requested and recourse must have been had to dispute settlement mechanisms. None of those conditions should be omitted where crimes were involved.

3. The objective of countermeasures must be to compel compliance with an obligation, not to impose a punishment for non-compliance. The aim was to confirm the right of the injured State to adopt measures requiring the State which had committed an internationally wrongful act to fulfil its secondary obligations. The cessation of the wrongful act, reparation and a guarantee that the act would not be repeated were the goal.

4. With respect to proportionality, (article 13) and prohibited countermeasures, (article 14) it was entirely appropriate for the draft Convention to list countermeasures which were prohibited.

5. As to the provisions concerning the settlement of disputes, his delegation believed that whereas it was acceptable that any State should be able to bring a matter before the Security Council or the General Assembly, it had serious reservations as to the desirability of granting the right to bring a matter before the International Court of Justice by unilateral application. That

provision ran counter to the established principle that the competence of the Court hinged solely on the consent of the States parties to a dispute. His delegation also had concerns regarding the right of intervention granted by article 19, paragraph 4, of part two of the draft, which went beyond the letter and spirit of norms established, in particular, by the International Court of Justice, which held that such intervention must be based on a State's legitimate interest in a case.

6. As to the settlement of disputes arising out of the interpretation or application of the draft articles, dealt with in part three of the draft, his delegation considered that the proposed mechanism was excessively rigid and conflicted with a widely accepted principle enunciated in the Charter of the United Nations, in particular, its Article 33, paragraph 1, and in various international instruments, namely, the principle of the free choice of settlement procedures. Whereas draft article 5, paragraph 1, required the agreement of both parties to submit the dispute to arbitration, paragraph 2 authorized unilateral recourse where one State had taken countermeasures. Similarly, draft article 7 also provided for unilateral recourse to the International Court of Justice. It was essential to ensure coherence between article 19 of part two and part three of the draft articles and to ensure that their language properly reflected the fundamental principles of dispute settlement, in particular, those relating to the free choice of mechanisms and the required consent to implement a given mechanism.

7. Mr. MATIKO (United Republic of Tanzania) said that the speed with which the International Law Commission codified public international law lagged behind actual practice in the interaction of nations in such fields as science, business and diplomacy. His delegation therefore hoped that the use of ad hoc working groups would be encouraged in order to speed up the Commission's work. However, it did not agree that serious consideration should be given to using additional protocols, soft codification and restatements; while they might be useful in regulating international relations, they could neither play the role of multilateral conventions nor adequately satisfy the demands of public international law.

8. It was gratifying to note that the second reading of the draft Code of Crimes against the Peace and Security of Mankind had reached an advanced stage, that the first reading of the draft articles on State responsibility would be concluded in 1996 and that elaborate preparations were under way to address other items. His delegation hoped that by the end of the century the Commission would have elaborated a comprehensive set of conventions governing and binding States in various substantive areas.

9. Turning to the question of State responsibility, he welcomed the recent progress made on the topic. The identification of crimes and the need to institute an elaborate mechanism for redress were important if progress was to be made in that area. The breach of international obligations by a State must entail accountability. Regarding the nature of crimes for which a State could be held responsible, his delegation agreed with the concept elucidated in, but not limited to, draft article 19 of part one of the draft articles. On the implementation aspect of redress, although the proposed machinery of reference to the International Court of Justice might appear unduly cumbersome, it served

a useful judicial and political purpose. However, where the alleged crime was offensively flagrant and its scope had been delineated and acknowledged by a belligerent State, the other State might question the wisdom of seeking the Court's determination before contemplating appropriate countermeasures.

10. His delegation supported the Special Rapporteur's proposal to submit disputes to international political bodies for an assessment before seizing the Court of the matter. That procedure offered the international community an opportunity to be apprised of the problem and would facilitate the work of the Court. There would be no conflict of interest or competence.

11. With regard to proportionality, dealt with in part two, article 13 of the draft articles, his delegation believed that each international crime should be dealt with in the light of its intrinsic nature, while taking due consideration of the context and time-frame in which it occurred. His delegation generally could accept the prohibitive countermeasures listed in draft article 14. However, further work was needed, in particular, on subparagraph (b), which lacked conceptual clarity. It was also necessary to delimit the "extreme" nature of those countermeasures.

12. Turning to the dispute settlement proposals discussed in part three of the draft articles, he said that the flexibility with which the settlement procedure apparently could be applied, while allowing the harmonious and speedy settlement of disputes, might not adequately protect a weaker State from a stronger and usually belligerent State. That lack of protection must be given serious attention and the seemingly obligatory aspects of the conciliation and arbitration mechanism detailed in the annex was a move in the right direction. The main feature of article 1 of the annex was that it offered the parties the opportunity to sort out their differences amicably through compulsory negotiations before they had recourse to the stricter forms of dispute settlement.

13. The provision stating that a third party could tender its good offices or offer to mediate, even when not called upon, was not uncommon and should not be viewed as an unwarranted intrusion. Most disputes that would otherwise have escalated into conflicts had been settled in that manner. The provision was carefully framed to promise objectivity while balancing the interests of the third party and those of the States involved in the dispute.

14. Should it prove impossible to achieve a consensual agreement, the conciliation commission, which functioned in the manner of a commission of inquiry rather than of a conciliation board, did not offer the best avenue for settling a dispute. Given the awkward role that the conciliation commission was supposed to play, arbitration was almost inevitable. However, the fact that countermeasures were usually taken by an offended State presented a problem; under article 5, paragraph 2, the State against which countermeasures had been taken - which was usually the offending State - could unilaterally request the intervention of an arbitral tribunal, while the other party would have to abide by the same rules and was denied the right to seek arbitration. The fact that countermeasures were normally taken by powerful States offered a possible justification for maintaining that overtly biased provision, but would not produce the desired deterrent effect on them. Since it was difficult to

apportion fault at that stage of the dispute, he suggested that both parties should be given an equal opportunity to submit the dispute to the arbitral tribunal.

15. Mr. STANCZYK (Poland), commenting on the draft articles on State responsibility, said that the concept of State crime continued to provoke dramatically divided views within the International Law Commission and the Sixth Committee. That being so it was legitimate to ask whether any viable consensus on the issue was likely to emerge within the Commission and, ultimately and most importantly, within the international community of States.

16. International crimes were not an integral part of positive international law. With the exception of the war in the Persian Gulf and the consequences determined by the Security Council in its resolution 687 (1991), States had failed to corroborate their views regarding international criminal responsibility by setting in motion the substantive or instrumental consequences of a State crime in situations calling for a response by the international community. An international crime could not be equated with a breach of either an erga omnes or a jus cogens obligation, the former being a broader concept, while the latter, possibly also broader, might exacerbate rather than resolve the problem of identification. Regarding the institutional aspects of international criminal responsibility of States, any role assigned to the International Court of Justice should be carefully weighed against the past experience of the Court in other areas, such as in the Vienna Convention on the Law of Treaties with respect to jus cogens norms. Any decisions concerning the existence or attribution of a crime should give careful consideration to procedural guarantees. In particular, in building the relationship between any future convention on State responsibility and the competence of the Security Council under Chapter VII of the Charter of the United Nations, account must be taken of the Council's recently discernible willingness to give a broad reading of those competencies. A clear answer must be found to the problem of the relationship between the criminal responsibility of a State and that of an individual. It had to be decided whether determination and attribution in one system were valid also in the other.

17. His Government urged caution regarding the specific mechanism for settlement of disputes envisaged in part three of the draft articles. A clear trend had recently emerged towards more frequent use of multilateral and bilateral dispute settlement mechanisms. Therefore, any generalized mechanisms introduced by States should be conceived along modest lines and given a subsidiary role. The mechanism envisaged by the Commission, on the contrary, was tantamount to an exclusionary, self-contained system, which would obviate the need for any other mechanisms. While intellectual boldness counted for much, too great a departure from the solid ground of State practice could discourage acceptance by States. What was being proposed in the Special Rapporteur's seventh report as a postulate of a system, or as being logically inescapable, was coming disappointingly close to an artificial structure unlikely to stand on its own.

18. Draft articles 13 and 14 of part two, on proportionality and countermeasures respectively, together with the commentaries, thereto, had a solid ground in both practice and theory. However, he wondered whether the

prohibitions contained in article 14, paragraphs (d) and (e), were sufficiently precise to ensure unquestioned application, given that the mechanism for dispute settlement might be subject to particularly demanding tests.

19. Turning to the long-standing topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that progress had been far from satisfactory. While some were ready to move on to a broader area of environmental law, others urged caution, arguing that the draft articles on prevention alone might already constitute a self-contained mechanism of primary rules, and that any breach of those rules would be dealt with under the international law of State responsibility. It was difficult to define the legal consequences which might ensue from negative transboundary effects, as opposed to the breach of an obligation. It might well be argued that State practice offered no consistent theory of accountability for transboundary harm. The Commission should ensure that it did not exceed its mandate in connection with international liability by entering the sphere of State responsibility. That could occur if harm were accepted as the centrepiece of the system since, where substantial transboundary harm had occurred, liability would ensue, followed by the duty to make reparation, in turn introducing the question of whether that obligation should be assumed by the State, the operator or some combination of the two. The commentary to article C showed that the Commission was aware of that difficulty. The Commission should certainly, at some future point, deal with the law of the environment. Meanwhile, it should proceed with its work on international liability in a manner that would ultimately enable States to accept the final result of its work.

20. Mr. VUKAS (Croatia), referring to the topic of State responsibility, said that criminal responsibility could not be limited to individuals. Organizations, including Governments, which engaged in criminal activities, involved many other individuals, besides the immediate perpetrators, who indirectly contributed to the commission of crimes. Such criminal organizations and agencies should be punished and dissolved, and States should compensate their victims. That did not imply punishing the entire nation to which the organizations or agencies belonged, as claimed by some members of the Commission. He was disappointed that even the Special Rapporteur was not prepared to accept all the implications of including the term "crime" in his draft. There was no valid reason to reopen the discussion on the appropriateness of using that term in respect of States, since the Commission had accepted aggression as a crime in its discussion on the draft Code of Crimes against the Peace and Security of Mankind. All the proposals made in that connection had been based on the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), article 1 of which indicated that States were potential perpetrators of the unquestionable crime of aggression under international law.

21. Both legal doctrine and major judicial decisions had confirmed that not only individuals, but also organizations and States could commit crimes. That concept was deeply rooted in contemporary international law, as confirmed by the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, which had been invoked in 1993 by the republic of Bosnia and Herzegovina when instituting proceedings before the International Court of

Justice against Yugoslavia (Serbia and Montenegro) for the crime of genocide committed against the non-Serbian population in Bosnia and Herzegovina. The provisional measures indicated by the Court on two occasions were merely the first step in that judicial procedure against a State committing a crime. Once it had been accepted that States could commit crimes, many of the general principles of criminal law should apply to crimes committed by States.

22. With regard to the concept of "injured State", the claim that all States were injured by an international crime was generally unfounded, although some crimes, such as illicit traffic in narcotic drugs or severe damage to the environment, would directly affect or threaten more than one State or even all States.

23. While he viewed with sympathy the institutional scheme proposed by the Special Rapporteur in article 19 of part two of the draft, he shared the view of some members of the Commission that the majority of States were not ready to accept a dispute settlement mechanism entailing a binding decision by the International Court of Justice in respect of State responsibility.

24. Turning to the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", he observed that the title was conceived in general terms, whereas the draft articles dealt only with liability for harm caused to the environment, together with some other issues relevant to protection of the environment. They did not cover other activities not prohibited by international law which could engage international liability, such as financial or trade activities.

25. Without venturing to propose a definition of the environment, his delegation considered that at least some components of the man-made environment should be included, and that the concept of the man-made environment should not be confined to what the Special Rapporteur referred to as the "cultural environment" (A/50/10, para. 379) since all human interventions relating to the management and conservation of natural resources should be treated as the resources themselves. He also shared the doubts expressed concerning the wisdom of excluding the human factor.

26. The definition of "transboundary harm" contained in article 2 (b) should be broadened to include the areas beyond, as well as under, the jurisdiction of any State, such as the high seas, the international sea-bed area, Antarctica and outer space. Therefore, the main principles concerning, inter alia, cooperation and prevention, should be appropriately applied to any harm caused beyond the limits of national jurisdiction, irrespective of whether the harm was caused to another State, or to mankind as a whole.

27. Concerning the Committee's method of work, he suggested that the two weeks devoted to the Commission's report could be used to advantage better. It would be preferable to have shorter statements by States on selected topics, particularly those suggested by the Commission, and a direct and immediate dialogue between the representatives of States and members of the Commission, particularly the Special Rapporteur.

28. Mr. ZAIMOV (Bulgaria) said that his delegation had always considered the topic of State responsibility to be one of the most important items on the Commission's agenda. While fully aware of the complexity of the concept of "State crimes" and the controversy to which it gave rise, his delegation endorsed article 19 of part one of the draft articles, which introduced the idea of international crimes, specified types of international crimes and distinguished between crimes and delicts. In his delegation's view, such a distinction must be based on the seriousness of the consequences of the act in question and the extent of the material, legal and moral injury caused to other States and the international community. The nature of State responsibility was neither civil nor criminal; rather it was international because it was set in motion by factual occurrences.

29. His delegation shared the view of the Special Rapporteur, summarized in paragraph 246 of the Commission's report (A/50/10) that in order for an internationally wrongful act to be classified as a crime under article 19, it must infringe erga omnes and possibly jus cogens rules; injure all States; justify a generalized demand for cessation/reparation; and justify a generalized reaction by States. Furthermore, "crime" was the appropriate word because it had long been current in legal parlance, had a negative connotation and brought a moral element into the legal domain. Lastly, since the word "crime", in article 19, had been included as adopted on first reading on 1976, it was hardly acceptable at the current stage for the Commission to reverse a decision of such importance.

30. If an international crime was to be designated as a qualified case of an international breach of law, there was a need for a special regime governing State responsibility, which must include a set of legal consequences going beyond the consequences of ordinary wrongful acts and which must put the instrumental consequences of the crime under the supervision of a judicial authority.

31. With regard to the concept of "injured State", States should not all have the same entitlements in terms of the substantive and instrumental consequences of a crime. The distinction between directly and indirectly injured States was relevant to both types of consequences.

32. On the question of countermeasures, all States should be entitled to take immediately the necessary measures to obtain cessation and avoid irreparable damage, but only the most directly concerned States should be entitled to take urgent interim measures to which the principle of proportionality would, of course, apply. In that regard, his delegation welcomed the adoption on first reading of article 13 (Proportionality) and article 14 (Prohibited countermeasures) and the seven articles contained in part three under the heading "Settlement of disputes".

33. His delegation provisionally welcomed the new articles proposed by the Special Rapporteur, namely, articles 15 to 20 of part two, and article 7 of part three. The proposed system under article 19 of part two was bold and progressive but needed further scrutiny. In general, his delegation was satisfied that the draft articles had provided two categories of substantive consequences and the institutional means of implementing them. Owing to the

guarantees provided in draft article 20, the proposed institutional mechanism would not, in principle, prejudice the constitutional functions of the Security Council or the right to self-defence under Article 51 of the Charter of the United Nations.

34. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the adoption by the Commission of articles A, B, C and D. There should also be provisions dealing with liability for transboundary harm caused to the global commons, which constituted, de facto, harm to interests common to all countries. It was logical that the country in the territory or under the jurisdiction of which the activity causing the harm was carried out should be liable for the damage.

35. A clear concept of harm was essential to any future work on international liability. In that connection, the Commission should consider the implications of imposing liability for wrongful acts when a State failed to fulfil its obligations of prevention, in relation to the articles on State responsibility.

36. It was important to determine the basis of the obligation of States to compensate for transboundary harm not prohibited by international law. No difficulties arose when such obligations were set forth in a treaty. However, in the contrary case, it was difficult to determine which law might be applicable. There was a need for rules in that regard under public international law, without preventing claimants from instituting procedures under private international law.

37. The most common form of reparation provided for under existing conventions on damage to the environment was very similar to naturalis restitutio or restoration of the damaged elements. The definition of harm must take that aspect into account and, in that connection, his delegation proposed that in the draft article on harm (A/CN.4/468, para. 38), the words "the status quo ante" should be inserted after "restore" in paragraph (c) (i), and that subparagraph (iii), which was not stringent enough, should be reworded.

38. Mr. BAXTER (Australia), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that the content ratione materiae of the Code was clearly an issue of fundamental importance and one which would continue to give rise to controversy. In his view, only crimes of a very serious nature should be included, so as to avoid any doubt that they truly constituted crimes against the peace and security of mankind. That approach was also the most likely to attract wide adherence to the Code.

39. His delegation had noted similarities between the Commission's views and those of the Ad Hoc Committee on the establishment of an international criminal court. Both forums seemed to agree on the need to deal, at a minimum, with abhorrent acts, such as genocide, crimes against humanity and serious war crimes. The Commission's discussion with regard to aggression had also raised issues which were relevant to both the Code and the court, for example, the role of the Security Council in determining the existence of an act of aggression. It was important to coordinate the Commission's consideration of the draft Code

and the Ad Hoc Committee's debate on crimes which would be dealt with by the proposed court.

40. The crime of genocide must, without any doubt, be included in the draft Code. The definition of that crime in the Code, as well as in the statute of the international criminal court, should be based on the definition contained in the Genocide Convention. Members of the Ad Hoc Committee had expressed concern about the lack of protection offered by that convention to political and social groups. Those concerns would be addressed in great measure if acts committed against members of such groups, a systematic campaign of killing for example, could be considered as crimes against humanity.

41. His delegation endorsed "crimes against humanity" as the new title for draft article 21. That expression was being used in the statutes of the international ad hoc tribunals and appeared in the criminal legislation and penal codes of various countries. There was no need under customary international law to link crimes against humanity with armed conflict. Crimes against humanity could be committed during times of peace as well.

42. The scope of draft article 22, dealing with exceptionally serious war crimes, should be extended to include internal armed conflicts. Clearly, the notion of grave breaches of the Geneva Conventions applied only to acts committed in international armed conflicts. Failure to cover internal armed conflicts would be a serious omission, given the number of conflicts of that nature in recent years.

43. In its consideration of the topic of State responsibility, the Commission spent a large portion of its time elaborating the normative and institutional consequences of State crimes. While greatly respecting the idealism and intellectual commitment of those who had worked on the topic, in particular the Special Rapporteur, his delegation had some reservations as to the value of those efforts. The issue of State crimes raised difficult and basic questions, including the consequences attaching to an international crime committed by a State, an issue which the Commission had not resolved.

44. Article 19 of part two of the draft articles on State responsibility raised a number of fundamental and still unresolved issues. One was the use of political organs to make the initial determination of the existence of an international crime. Another concerned the proposed function of the International Court of Justice: assuming that it continued to operate in its current manner, was the Court suited to make the final decision with regard to the existence of an international crime and would it be able to respond quickly enough to an international crime which was being committed by a State?

45. His delegation endorsed the view of many others which were concerned about the Commission's focus on State crimes. The practical benefits for States were not sufficient to justify further expenditure of the Commission's limited time on that matter. He urged it to take steps to ensure that it would reach its goal of completing the first reading of the draft articles on State responsibility by the following year.

46. His delegation commended the Commission on its work on countermeasures and dispute settlement, which would be of immediate practical value to States. Articles 13 and 14 of part two and the commentaries thereto were a valuable summary of State practice in that area.

47. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation considered it unfortunate that the Commission had been able to give only preliminary consideration to the Special Rapporteur's last two reports. International liability was an important matter for States and the Special Rapporteur's focus on that aspect was welcome. In future years, the Commission must allow sufficient time for examination of the topic and, in that regard, as suggested by the delegation of Ireland, it might give some thought to reorganizing the manner in which it considered the item.

48. His delegation found it unacceptable that the victim of injury from an incident resulting in transboundary damage could remain uncompensated merely because the private operator involved did not have sufficient financial resources. Residual State liability was essential and, accordingly, his delegation strongly favoured alternative A under article 21. There might even be another possibility, similar to option C in paragraph 26 of the Special Rapporteur's tenth report (A/CN.459) wherein the State in which the incident occurred would be liable for any residual damage not compensated by the operator, regardless of whether there was fault on the part of the State.

49. His delegation did not believe that harm to the environment should be limited to "service values". Under certain circumstances, compensation might be sought in relation to damage to the intrinsic values of a landscape. In that context, he wished to draw attention to current efforts to elaborate a liability annex to the Protocol on Environmental Protection to the Antartic Treaty.

50. At its 1995 session, the Commission has adopted four new draft articles on international liability, among which article C (Liability and reparation) was particularly welcome. Nevertheless, the new articles raised certain concerns. First, the references to "significant" transboundary harm meant that genuine harm might go uncompensated because it failed to reach the rather high threshold of "significant". Secondly, the use of the standard of due diligence to prevent or minimize the risk of causing transboundary harm, and the fact that such an obligation was not an obligation of result, did not seem to be appropriate under all circumstances. His delegation accordingly welcomed the reference in article A to "specific obligations owed to other States in that regard", which indicated that specific treaty regimes might contain obligations of result concerning measures to prevent or minimize the risk of transboundary harm. Thirdly, according to the commentary, the initial clause of article C, which read "In accordance with the present articles", was designed to convey the understanding that the principles of liability were treaty-based. If that implied the absence of any basis for the principle in customary international law, his delegation strongly disagreed. Australia had long held the view that liability arose under customary law for transboundary pollution.

51. The Commission must in future schedule enough time for an adequate consideration of the topic of international liability. That matter was

currently under consideration in several multilateral forums, including the International Maritime Organization, which was elaborating an international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, and the Standing Committee on Nuclear Liability of the International Atomic Energy Agency.

52. Ms. HOUMMANE (Morocco) said it was unfortunate that the members of the Commission had been unable to resolve their differences with regard to the draft Code of Crimes against the Peace and Security of Mankind. As a result, final adoption of the Code had had to be postponed.

53. The Commission must make every effort to complete its work on the draft Code, in order to provide the proposed international criminal court, on which work seemed to be proceeding well, with a reliable and comprehensive legal instrument for the suppression of exceptionally serious crimes. Such an instrument was urgently needed in view of the increase in serious crimes against the peace and security of mankind, perpetrated by individuals who very often acted with impunity.

54. The Special Rapporteur had reduced the number of crimes included in the draft Code from the original 12 to six. Her delegation would have preferred a code encompassing exceptionally serious offences which threatened the peace and security of mankind. At the same time, it appreciated the efforts of the Special Rapporteur to limit the list to offences whose designation as crimes under the Code would hardly be disputed, in order to settle the long-standing dispute between the maximalist and minimalist schools.

55. It seemed unfortunate, nevertheless, that deliberate and serious harm to the environment had not been included on the list. That type of harm represented not only an increasingly common phenomenon but also a serious threat to current and future generations. It clearly met all the conditions universally understood under criminal law as defining a crime, namely, a physical initiative which was in violation of the law and which gave rise to an injury, there being a causal link between the act and the outcome. One example, which must not be allowed to continue with impunity, was the illicit dumping of toxic waste in the territory of or in waters under the national jurisdiction of certain countries.

56. The new version of draft article 15 on aggression was welcome but could be still more rigorous. In that connection, more consideration should be given to the role of the Security Council and to the principle of the independence of the proposed international criminal court.

57. Her delegation felt that the proposed new title of article 21 was an improvement, although the title should still reflect the massive and systematic nature of the crimes concerned.

58. As to penalties, it was true that the Code should include crimes, penalties and jurisdiction, in order to accord with the principle nullum crimen sine lege, nulla poena sine lege. However, since crimes against the peace and security of mankind could take the most diverse forms, a maximum penalty should be established, taking into account the seriousness of the crimes concerned,

leaving it to the judge to decide on the penalty in the light of attenuating or aggravating circumstances.

59. On the subject of State responsibility, her delegation agreed that a distinction should be made between State responsibility for crimes and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind. Although the international responsibility of States for acts or omissions regarded as international crimes did not require the identification or precise definition of the crimes in question, all crimes against the peace and security of mankind were considered to be crimes under international law and entailed the criminal responsibility of their perpetrators and also State responsibility. A State which had suffered material damage because of the unlawful conduct of another State should be entitled to obtain reparation; however, for humanitarian reasons and taking into account the vital needs of the population, limits should be placed on the reparation demanded from the State which committed the crime.

60. Her delegation had reservations about the wisdom of including countermeasures in the draft articles and noted with satisfaction the Commission's decision not to submit the articles in question to the General Assembly. Those articles could legitimize the use of coercive measures at the expense of justice and equity, which should be the key elements of a new world order. International relations must be governed by the rule of law in order to preserve the sovereign equality, territorial integrity and the political independence of States.

61. With regard to article 14, paragraph (c), on prohibited countermeasures which infringed "the inviolability of diplomatic or consular agents, premises, archives and documents", it should be noted that diplomatic law provided that an injured State could declare a diplomatic agent persona non grata, break or suspend diplomatic relations, or recall its ambassadors; those were acts of retaliation which did not require any precise justification. However, the question of the inviolability of diplomatic and consular agents, premises, archives and documents was an absolute rule from which no derogation was authorized. That minimum guarantee of protection was essential to ensure communication among States during crises and at other times.

62. Her delegation felt that the working group should continue its consideration of the question of State succession and its impact on the nationality of natural and legal persons since the subject had become particularly relevant in recent years. It agreed with the Special Rapporteur that, in contrast to international treaties or State property, archives and debts, nationality, being governed essentially by internal law, excluded a priori any notion of "substitution" or "devolution" since international law could not replace internal law in determining which individual was a national. That principle was recognized under international law (the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws), in case law (the 1955 Judgement of the International Court of Justice in the Nottebohm case) and in legal doctrine.

63. A distinction needed to be made between the granting of nationality, which was within the exclusive competence of each State, and its opposability, which

was a matter for international law, although States were reluctant to admit any limitation on their competence in that respect. In practice, the problem of nationality in cases of the ceding or return of territories should be resolved within the framework of an international agreement reflecting a balance of the interests of the States concerned. International law on the subject should be based on general rules deriving from State practice in order to eliminate cases of statelessness and dual nationality in cases of State succession and resolve problems deriving from conflicts of law and jurisdiction.

64. Mr. MAPANGO (Zaire) said that State responsibility for international crimes was a very important topic because it was essentially based on the purposes and principles of the Charter of the United Nations and if successfully defined would enable States to live in harmony and small States to survive alongside large States, which had a duty to protect them.

65. Zaire's position on the concept of State crimes remained unchanged; the State, because of its legal personality and in the context of its varied relations with other States, was responsible for its acts, including crimes or delicts violating international law. As in the case of individuals, a clear distinction needed to be made between crimes and delicts committed by States in order to draw all the legal consequences. As noted in paragraph 254 of the report, a breach of an international tariff clause could not be placed on the same level as genocide or occupation of territory by another State. His delegation was concerned about the selective approach taken by certain delegations, deriving from a divergence of interests which was not always clearly perceived, especially by third world delegations.

66. Reference was made, in paragraph 261 of the report, to the Guiding Principles for Crime Prevention and Criminal Justice adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders; if, on the basis of those Principles, not only persons who had acted on behalf of an institution or corporation, but also the institution or corporation itself, were made criminally responsible, the international community would be in the forefront of the development of international law. Although some delegations had taken the view that the incrimination of States could lead to the punishment of an entire people, his delegation believed that if provisions were made to spare the population of the State concerned from extreme hardship, that would strengthen the mechanism for the protection of the population, rather than leaving the whole question unregulated, disguising the punitive aspect under the cover of restitution or guarantees of non-repetition. The Commission must heed the lessons of history.

67. Since the Commission had unanimously adopted article 19 of part one, of the draft articles, which embodied the concept of "State crime", it was unacceptable to be constantly reverting to a question which had already been decided. The relationship between the legal regime of the consequences of crimes and other existing or prospective legal regimes was stressed in paragraph 270 of the report. Concerning the view that a distinction should be made between State responsibility and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind, his delegation was disappointed that while the argument nullum crimen sine lege had been used to exclude certain crimes from the Code, the Commission could not bring itself to

define the criminal acts or omissions of States as crimes, despite its unanimous adoption of article 19 of part one of the draft articles. The advocates of that approach were the same as those who had taken it upon themselves to select the crimes to be included in the draft Code and also wanted to restrict international State responsibility so that States could avoid prosecution for crimes and also the condemnation of the international community. His delegation could not support that approach, particularly since all the crimes envisaged were true crimes under international law and therefore entailed the responsibility of their perpetrators, with all the consequences envisaged in the report.

68. On the implementation of that responsibility, while a State could not be imprisoned, it could be prosecuted for reparation of the damage it had caused. His delegation therefore supported the Special Rapporteur's view in that respect, which would exclude any excessive clause which would unduly infringe on the rules and principles of international law concerning the protection of the sovereignty, independence and stability of the offending State; that should alleviate the concerns of those who wanted to exclude the responsibility of States for crimes they had perpetrated.

69. His delegation supported the idea that that responsibility should derive from a particularly serious violation of an erga omnes international obligation, which must naturally give rise to all legal consequences, with the necessary adjustments for aggravated responsibility.

70. His delegation endorsed the Special Rapporteur's institutional scheme, whereby the political organs of the United Nations would make a preliminary political assessment, and the International Court of Justice would make a decisive pronouncement on the existence of an international crime. It noted that the draft articles on State responsibility had deterrent as well as punitive value.

71. On international liability for injurious consequences arising out of acts not prohibited by international law, his delegation believed that that type of responsibility derived from the concept of the risk taken by the perpetrator of the activity which caused transboundary harm. When a causal link could be established between the activity and the damage caused, State responsibility was entailed. When the actions were those of an individual, they still entailed the responsibility of the State because the State controlled all activities which might give rise to transboundary harm.

72. Mr. SANGIAMBUT (Thailand), referring to part two, article 13, of the draft articles on State responsibility, on the question of proportionality, said that the negative formulation "shall not be out of proportion" might allow for the possibility of an escalation of reprisals; that question needed to be resolved since countermeasures should be temporary and when the situation reverted to normal or reparation was settled they should be discontinued.

73. Mr. RAO (Chairman, International Law Commission) said that paragraph (5) of the commentary to article 13 made it very clear why a flexible negative formulation had been used in that article and how it was linked to determining the degree of gravity.

The meeting rose at 5.35 p.m.

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21st meeting
held on
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SUMMARY RECORD OF THE 21st MEETING

Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 3.20 p.m.

TRIBUTE TO THE MEMORY OF JUDGE ANDRES AGUILAR MAWDSLEY, MEMBER OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN paid tribute to the memory of Judge Andrés Aguilar Mawdsley.

2. At the invitation of the Chairman, the members of the Committee observed a minute of silence.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

3. Mr. VARŠO (Slovakia) said that Slovakia shared the doubts of certain delegations regarding the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. It seemed that the Commission was seeking to create a new legal category, consisting of the imposition of obligations upon a State because it had engaged in an activity not prohibited by law. Confirmation of that fact could be found in the wording of draft article 1, which was based on two elements: the non-prohibited activity of a State, and the harm caused by that activity. There seemed to be a contradiction between those two elements, which were directly linked, raising the question whether a subject of law could be required to concern itself with the consequences of an activity which it had carried out in conformity with legal rules, and if so, whether the subject affected by that activity had a right to protection or must suffer the harmful consequences of non-prohibited activities, and whether the answers to those questions depended on the good will or bad will of the subject carrying out the activity in question.

4. It was generally recognized that the freedom to act was limited by the duty to avoid using that freedom to the detriment of others. The relations between subjects of law were based on the principle that if an act violates the rules of law, steps must be taken to satisfy any subject of law which had suffered harm as a result of that act. That clear and simple principle was a sine quo non condition for harmonizing the rights and duties of subjects of law. In the draft articles one effort had been made to strike a balance between the right of a State to carry out an activity within the framework of its own sovereign rights and its duty not to carry out activities which might violate the sovereign rights of another State. It was difficult to determine the line between those rights and duties, but the ambiguous concept of liability embodied in the draft articles did not seem to solve the problem, since, it would not meet the needs of either party in a potential dispute. Experience had shown that, once the balance between the rights and duties of legal subjects ceased to function, the legal order was endangered or even replaced by another order under which certain subjects demanded respect for their rights while ignoring their duties, to the detriment of the rights of others.

5. His delegation felt that the topic of international liability should be examined in greater depth; it might be advisable to consider whether it belonged in the domain of State responsibility. Furthermore, it was usually natural or

legal persons whose activities caused harm, and it might, therefore, be better for the consequences of such activities, and their prevention, to be dealt with at the level of private international law, a possibility which was mentioned, somewhat sceptically, in the Commission's report. That would not mean that a State would be relieved of its liability under public international law, but it would make it possible to establish liability at all levels and to ensure respect for the principle sic utere tuo ut alieum non laedas. The question of liability lay on the boundary between public international law and private international law and, in so far as it concerned the former, it must be dealt with in connection with State responsibility.

6. Slovakia agreed with other delegations that there was a need to determine what was to be regulated by the draft articles; in its view the goal should be to codify, above all, the norms relating to the protection of the environment from the standpoint of its use and exploitation for the benefit of present and future generations. The draft articles were a constructive step in that direction. The problem of transboundary harm had become significant as a consequence of the development of modern technology. Human activities having an impact on the environment fell into two categories. Some activities were planned and carried out with good intentions in order to improve nature for the benefit of individuals and of the environment; for example, States might agree on the basis of a treaty to prevent the flooding of a river which formed the boundary between their countries. Such intervention was normal and justified; it should not be a cause of concern to the international community because the States were in agreement on the improvement of the environment, and such activities did not require multilateral codification. Other activities were carried out, not in order to improve the environment, but in order to use or exploit it through the use of modern technology; for example, activities carried out in outer space, the transport of certain materials or the production of nuclear energy. Although such activities were carried out for the benefit of humankind, they were potentially harmful to the environment. While it was possible to forbid them, that might not be natural or useful for human beings. Realism suggested that such activities should be placed under control in order to prevent them from causing harm to the environment, and a rational and pragmatic solution would be cooperation among States on all aspects of environmental protection. The cooperation should be aimed first at preventing the risk of harm to the environment, then at reducing harm if an accident occurred, and lastly at ensuring reparation for any harm caused. A reference to such cooperation might be included in the title of the future international legal instrument.

7. The current situation with regard to environmental protection was not satisfactory; the existing international instruments were inadequate in view of the fact that the number of activities potentially harmful to nature was growing apace with technical and technological progress, a fact which international law could not ignore. Any future international instrument should focus on the prevention of harm to the environment. To that end, it was necessary to emphasize the following: cooperation among States to protect the environment and reduce consequences harmful thereto; cooperation among States in the appropriate international bodies, particularly in the area of setting technical safety standards for dangerous activities resulting from technological progress; the need to formulate pragmatic rules governing cooperation to reduce harm

caused to the environment in the event of an accident; and the need to delimit the liability of the various subjects of law involved for consequences harmful to the environment.

8. Mr. AL-KHASAWNEH (Jordan), referring to the topic of State responsibility, said he felt that it was wrong to place too much faith in the concept of proportionality because it created the impression of a substantive and objective limitation on the freedom of States to resort to countermeasures whereas in reality it would be difficult to determine whether such freedom had been abused in a given case. Modern day international relations were so complex and interwoven that a breach in one area of international relations could trigger a countermeasure in another totally different area, and it was difficult to see how the concept of proportionality could be relied upon to provide a yardstick against which the legality of the countermeasure could be judged. The view that the concept of proportionality should be abandoned altogether was an extreme position; however, in view of the importance of avoiding escalation in the application of countermeasures, and of certainty of applicable law, it might be necessary to reformulate the concept.

9. Concerning article 14, his delegation believed that the categories of prohibited countermeasures were too broadly stated and might require some additions. First, treaties establishing boundaries should be expressly included as the law of treaties protected such treaties against changes in circumstances and the unity of purpose of international law would be better served if the suspension or denunciation of such treaties were to be similarly protected from the application of countermeasures. Second, the reference to "basic human rights" in subparagraph (d) left much room for injustice. For example, his delegation believed that the rights of the citizens of a State against which countermeasures had been taken to own property in the State which had taken the countermeasures should be protected as a basic human right because countermeasures were essentially a matter between sovereign States and their effect on individuals should be minimal. Third, countermeasures should be expressly prohibited when they had significant adverse effects on third States, without prejudice to the right of the injured State to take other countermeasures.

10. With regard to the concept of "State crime", there was no doubt that, under the regime of the maintenance of international peace and security, States were currently subject to consequences which had the same effect or even exceeded the consequences of the crimes envisaged in the draft articles. The draft articles sought to introduce substantive rules in order to spare the populations of wrongdoing States from the excesses that might result from lack of regulation or political expediency.

11. His delegation was not fully convinced that it was impossible to transfer the concept of criminal responsibility from national law to international law. The maxim societas delinquere non potest applied in national societies which recognized the criminal responsibility of moral persons but did not apply in international law. His delegation felt that the question of whether the distinction between civil and criminal responsibility was dichotomous or relative was irrelevant; international responsibility for grave breaches could not be discharged solely by reparation or the payment of pecuniary compensation.

What pecuniary compensation could wipe out the effects of genocide? It was because civil responsibility could never provide restitutio in integrum that the introduction of a special class of delicts qualified as crimes was justified. A punitive element was as much a part of the concept of justice as a corrective element.

12. The division of internationally wrongful acts into delicts and crimes had been made in article 19 adopted on first reading in 1978; sound methodology required that the issue should not be reopened at every stage of the Committee's deliberations. Certain conclusions flowed from that distinction in terms of the consequences attaching to each category of wrongful acts.

13. At the same time, his delegation did not feel that the division of breaches into delicts and crimes was perfect; it was disconcerting that serious breaches which did not qualify as crimes would not carry consequences commensurate with their seriousness. There was a real danger that if the consequences of crimes were made radically different from those of delicts, little would be done to regulate through judicial assessment the law of State responsibility relating to delicts, which constituted the vast majority of cases of internationally wrongful acts. Similarly, his delegation could not understand why the obligations laid down in article 18, paragraph 1 (a) and (b) should be confined to crimes. The problem would be alleviated not by diluting the consequences of crimes but by increasing the consequences of delicts in the field of the third party settlement of disputes; his delegation would await the results of the work on the articles 11 and 12.

14. The same problem arose in respect of the settlement of disputes because of the existence of two regimes, one for the settlement of disputes where countermeasures had been applied and one for cases where countermeasures had not yet been applied. His delegation felt that a less rigorous regime for situations where countermeasures had not been applied was an invitation to injured States to resort to countermeasures so that they could better avail themselves of the dispute settlement procedure envisaged for that eventuality. It should be constantly borne in mind that countermeasures were forms of self-help that were innately inimical to the development of international law into a centralized system and were capable of abuse given the differences in power among States. His delegation agreed that a third party should decide whether there were reasons for the application of countermeasures and whether such countermeasures were within the limits established by the law.

15. His delegation had little difficulty with the substantive consequences of crimes. As to the regulation of instrumental consequences, his delegation agreed with the approach taken by the Special Rapporteur. However, that scheme must take into account the constitutional limitations on the powers of the Security Council, the General Assembly and the International Court of Justice and their equal status, and must be made less cumbersome and slow.

16. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that after 15 years of consideration of that topic, the Committee was still trying to deal with the fundamentals. Legal reasoning admitted of only two active principles of obligation: responsibility for wrongfulness, and responsibility for harm sine

delicto. From the outset, it had been obvious that if the topic was to be developed successfully, a greater infusion of progressive development than either the Commission or Committee were ready for was needed.

17. The topic had undergone a partial metamorphosis into an environmental topic; his delegation felt that that was grossly misconceived. First, environmental protection was best achieved at the preventive level and had nothing to do with the payment of compensation once harm occurred, which was the cornerstone of the topic. Second, the boundaries of prohibition were continuously being restricted in the interests of intergenerational equity and the freedom of others and the consequences of responsibility and not the strict liability standard would be increasingly called upon to regulate inter-State activities. For example, it was conceivable that the law would tolerate some pollution against payment of pecuniary compensation, but it was difficult to see how significant pollution could be tolerated even if there was compensation. Once that threshold was reached, it became a matter of responsibility, not liability. His delegation therefore felt that the formulation of draft article C created a confusion with State responsibility for it was the weakest formulation of the maxim sic utere tuo ut alienum non laedas. Third, confining liability to transboundary harm carried connotations of environmental protection which restricted the topics scoped. His delegation agreed that the distinction that the Special Rapporteur had made between State liability and operator liability would only add to the confusion and blur the distinction with State responsibility.

18. His delegation had no major problem with the Special Rapporteur's analysis of the responsibility of the operator, but felt that what was needed was a reassessment of the topic after 15 years of work. The Committee should accept the development of the topic almost exclusively on the basis of progressive development given the paucity of precedents. The topic should consist essentially of the requirement to compensate where harm without fault had occurred. A standard of strict liability should be the guiding principle; the perceptibility of harm should be relevant only to the extent that it might have an impact on the nature and degree of compensation. Exonerating circumstances should be admitted to regulate the operation of the standard of strict liability; there should be room for negotiations aimed at finding modalities for implementing the substantive rules; and the procedures usually associated with civil liability should be introduced into the text. The Committee would then have a clear end-product filling a lacuna in the overall system of State responsibility. Otherwise events and piecemeal developments would overtake work on the topic.

19. Mrs. FLORES (Uruguay), referring to the topic of State responsibility, said that her delegation reaffirmed its position in favour of maintaining the distinction between international crimes and international delicts, on the basis of the concept of the erga omnes obligations of States recognized by the International Court of Justice in the Barcelona Traction case.

20. Article 19, paragraph 2, of part one of the draft articles on State responsibility defined an international crime as a breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that

community as a whole. In the case of an international crime, the violation of such an obligation would allow entities other than the injured State to make claims based on responsibility for the violation, while in the case of an international delict, only the State directly injured would be able to invoke the responsibility of the wrongdoing State. The establishment of those two categories represented a departure from the traditional approach of linking the wrongful act to reparation and limiting the consequences arising from the violation of a norm of international law to a bilateral link between the wrongdoing State and the injured State. The distinction made between crimes and delicts was not a major advance, as some delegations maintained, since the criteria for identifying a crime had already been formulated in article 19 of part one. On the question of whether a State could be punished, her delegation felt that the question of the nature of the responsibility incurred by a State for grave violations of international law, whether criminal or sui generis, did not rule out the possibility of punishment. Articles 3 and 5 of the draft Code of Crimes against the Peace and Security of Mankind supported that position since they established the criminal responsibility of the individual without prejudice to the international responsibility of the State. The distinction between international crimes and international delicts had a direct influence on the legal consequences they engendered, as her delegation had already noted in the past.

21. Her delegation felt that article 16, paragraph 2, should be analysed more fully: restitution in kind should be materially feasible and morally tolerable. It had reservations about the Special Rapporteur's position on the issue of political independence as opposed to political regime. Furthermore, the scope of the expression "the vital needs of the population" needed to be defined.

22. Article 17 should not be included in the draft articles. As her delegation had noted in the past, countermeasures would be incompatible with modern international law; such measures were inherently illegal, and were no less illegal for being a response to and consequence of a prior wrongful act.

23. In article 18, the powers of the injured State vis-à-vis those of other States should be defined more precisely. Subparagraph (f) was not necessary.

24. Her delegation believed that article 19 required further study, although it supported the role assigned to the International Court of Justice in the institutional scheme proposed by the Special Rapporteur.

25. Regarding the draft articles to be included in part three, her delegation felt that in article 7, the grounds on which the validity of an arbitral award could be challenged should be specified.

26. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, the eleventh report of the Special Rapporteur had characterized harm as the condition sine qua non of any liability and compensation which might be due. Her delegation believed that the concept of transboundary harm was the key element in considering the topic. As it had noted in the past, the concepts of harm, responsibility and reparation were intricately linked. In the case of injurious consequences arising out of acts not prohibited by international law, the concept of harm was especially

relevant. When a State carried out or authorized an activity, it was implicitly authorizing the predictable consequences of such activity. While some lesser harm should be endured by virtue of the general principle of good-neighbourliness laid down in the preamble to and Article 74 of the Charter, transboundary harm could damage the territorial integrity and inviolability of another State by breaching the obligation of non-interference laid down in customary international law and embodied in the maxim sic utere tuo ut alienum non laedas. The right of a State to permanent sovereignty over its natural resources and the right to development could also be affected. In many cases, such damage amounted to an export of costs, which was a clear violation of the general principle of law prohibiting unjust enrichment. Her delegation therefore felt that beyond the existing treaty norms, harm that was caused should be compensated. That did not exclude the possibility of a regime of absolute liability for cases of transboundary harm.

27. Her delegation felt that harm to the environment could not be disregarded, but considered it to be only one of the aspects of transboundary harm. It did not agree with the view in paragraph 382 of the report that a distinction should be made between the requirement of reparation in the draft articles on State responsibility and the requirement in the current topic. Reparation should wipe out the consequences of the wrongful act and re-establish the situation which had existed previously. As noted in paragraph 384 of the report, the most appropriate remedy for harm to the environment was the total or partial restoration of the environment and when that was not possible, monetary compensation would have to be paid. Greater precision was needed in the proposed text for the definition of harm (A/50/10, footnote 226), particularly in paragraph (c). As to who should have the right of action in cases of harm, her delegation felt that individuals had locus standi for that purpose. If transboundary harm affected the rights of a State and its individuals or legal entities, provision should be made for their right to claim compensation. Her delegation believed that, in the definition of the environment that was adopted, the human factor was central and could not be excluded, in line with the approach taken in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development.

28. Mr. ELARABY (Egypt) said that the draft Code of Crimes against the Peace and Security of Mankind should focus only on the most serious international offences, to be determined by reference to general criteria, such as the political character of the crime and the possibility that the latter might endanger international peace and security, as well as to the relevant conventions and declarations.

29. Given their relevance to the contemporary needs of the international community, two of the six crimes excluded from the draft Code should be retained. The first was wilful and severe damage to the environment, and he welcomed the Commission's decision to establish a working group to examine the possibility of including it in the draft Code. The second was aggression, whose very existence required determination and action by the Security Council in accordance with the provisions of Article 39 of the Charter.

30. The definition of intervention formulated in article 17 was imprecise and its application could create difficulties, particularly with respect to

evidence. It could also be argued that the most explicit contemporary manifestations of intervention were the subversive terrorist activities already covered in article 24 on international terrorism.

31. His delegation strongly supported the retention of the six other crimes included in the draft Code. It favoured the use in article 15 of the wording of General Assembly resolution 3314 (XXIX), which had proved to be flexible and practical over the years. The General Assembly's definition of aggression was not incompatible with the role of the Security Council in determining the existence of an act of aggression, since the scope of the draft Code was limited to individuals and did not cover States.

32. With regard to the crime of genocide, the new article 19 had moved closer towards covering all acts punishable under the 1948 Genocide Convention, including acts of direct and public incitement to commit genocide. The text should be extended to include attempts to commit genocide and complicity in genocide in order to bring article 19 fully into alignment with the Genocide Convention.

33. He supported the change made in the title of article 21 on crimes against humanity to give it greater clarity and to remove any doubt as to when the jurisdiction of national courts ended and that of the international court began. The general reference in the last subparagraph to all other inhumane acts, however, diluted the precise and well-defined nature of the article.

34. He also welcomed the changes made in the title and in various paragraphs of article 22, in particular the reference in paragraph 1 to the Geneva Conventions of 1949 and in paragraph 2 to the violations of the laws or customs of war. However, the new concept of exceptionally serious war crime referred to in the first line of the article was vague and might require further elaboration.

35. The increased frequency of acts of international terrorism, in particular the taking of the lives of innocent people, made it imperative to retain article 24, although slight amendments to its current wording might be needed.

36. The crime of illicit traffic in narcotic drugs (article 25) should be retained, given the magnitude of the problem, which had a severe and negative impact on the economy and public health of every country and a well-established connection with international terrorism.

37. Turning to the topic of State responsibility, he said that, at the current stage, the concept of State responsibility for crimes was not favoured by many States. States did not commit crimes and were exempt from criminal responsibility. It was for the State alone to punish and it could not itself be punished. The application of the concept of State responsibility could result in the unfair punishment of an entire people. Certain recent precedents suggested that a new norm was perhaps emerging and that the matter was still under consideration. His delegation was open to further development of international law in that field.

38. Referring to paragraph 2, article 19, of part one of the draft, he said that the first part contained positive ideas regarding the role of the General

Assembly and the Security Council in examining acts alleged to constitute international crimes. While those ideas needed to be further explored, the second part of paragraph 2 was unrealistic in so far as it encroached upon the sovereign rights of States by imposing the compulsory jurisdiction of the International Court of Justice without the prior consent of the State alleged to be in violation of Article 36 of the Court's Statute. The paragraph was also contrary to such well-established legal principles of public law as the sovereign immunity of States and the act of the State.

39. He questioned the need to advance at the current stage to the controversial concept of State responsibility for crimes. The best way to achieve the deterrence factor was to attribute criminal responsibility to the individuals from the offending State who had committed the wrongful act.

40. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation supported the Special Rapporteur's proposed new text on the definition of harm, which included harm to the environment, an issue that was of particular importance to developing countries.

41. Of the three types of liability proposed, his delegation supported the principle of joint liability between the State and the operator whereby the wrongdoing State would be liable for the outstanding compensation if the operator failed to compensate the injured State in full or in part. That principle was consistent with the ultimate duty of the State to exercise due diligence over all activities within its territory, especially those of a dangerous nature. An injuring State could never be excused from culpability for transboundary harm to the environment which affected another State, even if no fault had been found on its part.

42. Mr. AL-BAHARNA (Bahrain) said that in his tenth report on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459), the Special Rapporteur had quite rightly examined the questions of civil liability together with the question of State responsibility. The draft articles proposed dealt with both substantive law and questions of procedure.

43. In his eleventh report (A/CN.4/468), the Special Rapporteur had introduced the notion of harm to the environment and proposed a text for the definition of harm. He had chosen a restricted definition of environment which limited harm to the environment exclusively to resources such as air, soil, water, fauna and flora and their interactions while dismissing the broader concept of environment which would cover landscape, property forming part of the cultural heritage and, generally, anything that caused physical harm to persons or their health, whether directly or as a result of environmental damage. It was difficult to accept that restricted definition. The concept of the environment was a changing one and could not remain static. Advances in science and technology were bound to affect human understanding of the various elements of the environment and their interaction with each other. The environment should therefore be defined in the broadest terms possible as it had been in the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to

the Environment and the 1992 Convention on Transboundary Effects of Industrial Accidents.

44. On the question of reparation for harm to the environment, the Special Rapporteur's view was that adverse effects on the environment could not by themselves constitute a form of harm. Developments since the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, however, had shown clearly that environmental degradation in itself constituted harm and that the environment belonged as much to States as to others interested in its preservation.

45. As to the other issues raised in the Commission's report, his delegation supported the recommendations on the identification of dangerous activities and had no objection to the provisional adoption on first reading of draft articles A, B, C, and D.

46. Turning to the topic of State responsibility, he said that, with regard to the normative aspect, the question was whether the international State crimes should involve any special or supplementary consequences that did not apply to international delicts. With regard to the institutional aspect, the question was whether in the case of international State crimes there should be some form of intervention or action by international political and judicial bodies to regulate the arbitrariness of countermeasures by individual States or groups of States.

47. In referring to the special or supplementary consequences of international State crimes, the question arose as to the extent to which the consequences of international delicts contemplated in articles 6 to 14 of part two applied to crimes. The Special Rapporteur was of the view that, in general, cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition would apply equally to international State crimes, but conceded that the principle of political independence and territorial integrity of States would qualify the applicability of restitution in kind, which should not be effected at the expense of the political independence and territorial integrity of States. On that point, there could not be two opinions. The Commission should apply the same kind of reasoning to the remedies of compensation, satisfaction and guarantees of non-repetition. No State should be subjected to measures that jeopardized its political independence, the vital needs of its people and its territorial integrity. The question of when the political independence or territorial integrity of a State could be said to be in jeopardy was, however, a delicate one and the Commission should consider whether it could be regulated by norms of international law in the absence of third-party determination and whether it was conceivable that States would agree to third-party decisions on such vital issues.

48. The issue of the role of international institutions in the context of the legal consequences of international State crimes was complex. Theoretically, international institutions, unlike States, were not endowed with power to redress a wrongful act. At the practical level, States which normally initiated action through international institutions had different interests to safeguard. Such constraints held out little hope for a high degree of institutionalization, which was one of the options indicated by the Special Rapporteur. The most

practical course that could reasonably be adopted in the current state of international relations was to have recourse to existing institutional machinery in a guarded manner; he was heartened to see that the Special Rapporteur also held that view.

49. The International Court of Justice currently lacked the necessary jurisdiction and infrastructure to issue a binding ruling in respect of legal consequences of international State crimes. Although the Special Rapporteur had suggested that the General Assembly was the international body best qualified to determine and attribute international crimes, its role was in fact severely restricted by the constitutional limitations on its powers, and its resolutions were, not, as a rule, legally binding. Neither did the Security Council possess the requisite legal authority in connection with State responsibility for international crimes, since its role was limited to maintaining international peace and security. He agreed with the Special Rapporteur that an optimum combination of the political and judicial elements should be found.

50. He further agreed that the International Court of Justice should be given jurisdiction to pass a binding judgement on issues in dispute, as opposed to exercising a merely advisory function.

51. Article 15 appeared acceptable, as it was based on the generally approved principle that a crime, as defined in article 19 of part one, would necessarily entail all the consequences of delicts in addition to supplementary and aggravated consequences.

52. He supported the provisions of article 16 relating to the substantive consequences of an international crime committed by a wrongdoing State, as defined under article 19 of part one of the draft, given that paragraph 3 made an exception to the rules and principles of international law regarding substantive consequences of international crimes committed by wrongdoing States thereby protecting their independence and territorial integrity and the vital interests of their peoples. He also subscribed to the comments by some members of the Commission to the effect that, contrary to the provisions of article 19, paragraph 5, of part two, presentation by an injured State of a demand for cessation of the wrongful act constituting an international crime should not be conditional upon a prior determination by the International Court of Justice.

53. In his view, the adaptations and modifications contained in article 17, in respect of articles 11, 13 and 14, deserved further consideration.

54. He agreed with the general remarks made in paragraph 301 of the report to the effect that article 18 failed to provide in its provisions "a distinction between the rights of the State whose individual rights were violated, and the rights of other States". On the other hand, in contract to the view expressed in paragraph 302 of the report, he believed that the requirement in paragraph 1 of a prior decision of the International Court of Justice for the obligations contained therein to come into effect was well-founded and valid.

55. With regard to article 19, he agreed with the view voiced by a number of members of the Commission that the institutional scheme set forth therein had many positive features.

56. He was pleased to note that article 20 reaffirmed the principle that articles 15 to 19 of part two did not affect any decisions taken by the Security Council under the Charter, or the inherent right of self-defence as provided in Article 51 of the Charter.

57. He supported the Special Rapporteur's proposal to include in part three draft article 7, providing for binding third party dispute settlement in any disputes arising between States parties with respect to the legal consequences of crimes under articles 6 to 19 of part two. He agreed that such a draft article should reflect the provisions of article 66 of the 1969 Vienna Convention on the Law of Treaties.

58. Commenting on the articles in part three of the draft and the annex thereto, he said that the settlement dispute mechanism they embodied represented a bold step in the progressive development of international law in respect of the settlement of disputes between States, which was traditionally based on the free choice of means of settlement. He agreed with those members of the Commission who thought it was wise, in the light of State practice, to include in the draft a mechanism for compulsory settlement of disputes such as that envisaged in part three, as being a reflection of progressive development of international law.

59. Ms. FLORES (Mexico), referring to the topic of State responsibility, said that the international community could delay no longer in reaching a clear and precise determination of the consequences arising from breaches of obligations under international law and identifying the legitimate means and mechanism to which States might have recourse to obtain redress for the ensuing harm.

60. The United Nations had been engaged in establishing a legal framework for State responsibility for 40 years, in the context of rapidly evolving inter-State practice which provided ample material on which to base that work. However, she was concerned by the Commission's current approach and considered that its work would be prolonged by its insistence on retaining in the draft articles concepts which created confusion.

61. Among the points open to question in the Commission's report, her delegation was particularly concerned about the provisions relating to countermeasures, the consequences of international crimes, and the settlement of disputes. Her delegation had on several previous occasions expressed doubts about including the first two points in the draft articles. It would be preferable to eliminate the provisions on countermeasures, which would certainly produce an imbalance since only strong States could take such action.

62. Her delegation shared the concern expressed by other delegations regarding the drawbacks attendant upon the concept of international crimes, and urged the Commission to consider to what extent that concept was useful within the general regime of State responsibility.

63. Mexico had already emphasized the importance of including in the draft provisions concerning disputes settlement mechanisms, which must be effective and expeditious in order to preclude the counterproductive effects of a process

which was excessively lengthy or expensive or restricted the freedom of States to choose their own means of settlement.

64. The legal framework of State responsibility should revolve around three basic principles: the existence of an act or omission that breached an obligation established by an existing norm of positive international law; the attribution of that wrongful act to a specific State; and the existence of loss or harm resulting directly from such conduct.

65. The Commission would be in a better position to complete the draft articles if it concentrated on analysing those points and their consequences with regard to reparation, and on analysing the legitimate mechanisms to which States affected by wrongful conduct could have recourse. The introduction of ancillary elements, whatever their theoretical justification, merely created practical difficulties and hampered the completion of an important instrument which was eagerly awaited by the international community.

66. Mr. VILLAGRAN KRAMER (Guatemala), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that his delegation viewed the topic in terms of liability for wrongful acts, liability for acts not prohibited by international law and liability for abuse of rights, and in the context of the possibility that a consensus could be achieved regarding the responsibility entailed by international crimes. As industry in highly developed countries grew ever bolder and capitalism gained momentum in developing countries, venture capital was becoming prevalent all over the world. Hence, the possibility that transboundary harm might become more prevalent and assume greater magnitude could not be ignored. The topic therefore called for precise conceptualization and should be clearly understood by developing countries, which had to deal with the repercussions of major economic activities.

67. One important step in that connection was to identify what could cause transboundary harm, and the Commission had been correct in taking as its starting-point the existing conventions dealing with issues concerning such harm. Transboundary harm might arise from activities carried out by three types of agent: the State, acting in its own capacity or in its capacity as operator, private operators, and mixed operators, where both the State and private parties were involved. The draft articles should therefore include, as had been proposed, a definition of the terms "operator" and, in particular, "private operator".

68. It was essential to make a clear distinction between "substantial" or "significant" harm and any other type of harm. In general, the Commission appeared to be making progress on defining the concept of harm. The definition proposed by the Special Rapporteur in his eleventh report (A/CN.4/468) provided clear and useful guidelines. His delegation agreed with the statement in paragraph 397 of the Commission's report that, in a preliminary stage, harm should cover the following elements: loss of life; personal injury or other impairment of health; loss of or damage to property and impairment of the natural resources, (including ecosystems), and human or cultural environment of the affected State.

69. His delegation endorsed the proposal by the Special Rapporteur to include prevention ex post in the chapter on prevention rather than in the chapter on reparation. Ten years previously, the Commission, in its work on the topic of international liability, had focused on acts not prohibited by international law. At that time, it had placed particular emphasis on responsibility for activities entailing risk and stressed that the entire topic should be viewed within the framework of strict liability. In 1992, the Commission had changed its approach: it had decided that the topic of international liability should be understood as comprising both issues of prevention and remedial measures and that the former should be considered first. That had led in turn to an emphasis on due diligence and, concomitantly, on guilt.

70. The Commission needed to clarify that matter. It was examining the problem of liability within the framework of prevention and, at the same time, it was dealing with the concept of liability for risk. Operators fell under the regime of strict liability whereas States, in the context of prevention, fell under the regime of responsibility for wrongful acts. In the event that harm occurred and the State involved had failed to take the required measures of prevention, that State could be held responsible; if an accident occurred, the operator was immediately liable. If in a particular case the State was also acting as operator, then it must assume full liability for both categories (prevention and operation). If the activity was being carried out by a private operator, that operator must assume full liability.

71. Such innovative reasoning opened the way to capitalism. Realistically it must be acknowledged that private operators, as opposed to States, were the most likely to be involved in the activities in question and, accordingly, the financial means envisaged to give effect to the fact of liability, such as insurance, were appropriate. However, as proposed by the Special Rapporteur, in the event that a private operator failed to meet his obligations completely, the State would assume subsidiary liability. His delegation endorsed that view.

72. His delegation was not fully satisfied with the draft articles. According to the draft text, non-compliance by the State of origin with the obligations of prevention set forth in the articles would result in the consequences provided for under international law with regard to breaches of international obligations. At the same time, according to article C (Liability and reparation), liability arose from significant transboundary harm and must give rise to reparation. In his view, two basic principles of law, which transcended the specific draft articles under consideration, must be incorporated in the final text: first, all damage must be repaired, and second, anyone who in the exercise of a right caused injury must repair that injury. The draft articles, as they stood, tended to diminish the force of the two principles.

73. One issue that remained to be resolved was that of the liability of the operator and the State when harm was caused to third parties.

74. Mr. CALERO RODRIGUES (Brazil) said that in endorsing the intention of the International Law Commission to undertake work on the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", the General Assembly, in its resolution 49/51, had said that it was so doing "on the understanding

that the final form to be given to the work on these topics shall be decided after a preliminary study is presented to the General Assembly". Perhaps because the Assembly's words lacked clarity, the Commission had interpreted that phrase differently in the two cases. In relation to reservations to treaties, it had decided that the conclusions of the debate on the Special Rapporteur's first report would serve as the preliminary study requested by the Assembly. In relation to State succession and nationality, however, the Special Rapporteur had interpreted those words to mean that the topic belonged in the category of "special assignments" and, consequently, should be considered in a manner different from the Commission's customary procedure.

75. That interpretation went beyond the intentions of the General Assembly and complicated matters unnecessarily. A Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons, established in 1995 by the Commission, had produced a first report which by no means met the requirement of a "preliminary study". Indeed, that report amounted to little more than a summary of the Special Rapporteur's first report and failed to provide the concrete guidelines which the Commission needed to engage in practical work and move away from the realm of theory. The Working Group would be reconvened the following year. His delegation could not endorse that approach. The Special Rapporteur's first report supplied all the elements necessary to complete the requested study in a short period of time. Yet, the Commission seemed to be moving away from presenting a preliminary study and to be embarking on the preparation of a detailed substantive study.

76. Returning to the topic of reservations to treaties, he noted that the Special Rapporteur's first report on that topic was a modest and brilliant work, offering an exhaustive analysis of the issues involved. While pointing out the many ambiguities and gaps in the 1969, 1978 and 1986 Vienna Conventions dealing with the law of treaties, the Special Rapporteur had expressed the firm conviction, with which his delegation fully agreed, that previous achievements must be preserved and that it was the task of the Commission to clarify the ambiguities and fill in the gaps.

77. In general, his delegation endorsed the conclusions drawn by the Special Rapporteur on the basis of the general debate in the Commission, and contained in paragraph 491 of its report.

78. The first report of the Special Rapporteur on State succession and its impact on the nationality of natural and legal persons, took a commonsense and cautious approach to an area where legal minefields abounded and every step had to be carefully measured. One criticism was perhaps in order: most of the issues dealt with in the report were considered in their general meaning, rather than in their significance in relation to State succession. Too much attention was given to almost endless categorization and breaking down of concepts and not enough to presenting general concepts. That fragmentation was unfortunately repeated, and even aggravated, in the report of the Working Group.

79. In his report, the Special Rapporteur had recalled two basic principles: nationality was governed essentially by internal law, and was also of concern to the international order. In cases of State succession, such concern was even more unquestionable. Succession of States on a large scale might give rise to

statelessness, depriving individuals of a right proclaimed in article 15 of the Universal Declaration of Human Rights, and could lead to situations of double nationality, a potential source of tensions and disputes. The intervention of international law might in that case be fully justified. A consensus had emerged in the Commission on the obligation of the States involved in a succession to negotiate the questions of nationality, an idea developed slightly in the Working Group's report. Unfortunately, as a result of too much categorization, the principles had become somewhat diluted. The question was whether a simple obligation to negotiate was sufficient to ensure that the problems related to nationality resulting from a succession of States would actually be resolved. He hoped that the Commission would be in a position to present a preliminary study on the topic to the General Assembly in 1996.

80. With regard to the Commission's long-term programme of work, he recalled that at its most recent session, the Commission had begun work on two new topics. Three other topics remained on its agenda. In his view, the fewer the items on the agenda, the more conscientious and comprehensive a study could be made of each topic. It had been suggested in the Commission that a new topic, "Diplomatic protection", should be included in its agenda and that a feasibility study should be done on a topic relating to law of the environment. He was not certain that such a course was appropriate: members were currently in the penultimate year of their mandate and the Commission already had a session of intense work before it. Additional assignments would only result in more time constraints and a reduction in quality. It would be preferable, in his view, to postpone consideration of those two suggestions until after the new members had been elected.

81. The representative of Austria had earlier expressed the view that because international relations had radically changed, changes in international law must follow and, in consequence, the Commission should not continue using the same traditional working methods and should strive to eliminate "a certain stagnation which was besetting the classical methods of promoting codification in the United Nations system". That logic was clear but not entirely without flaws. First, the changes which had occurred in international relations were not necessarily radical. Secondly, he was not convinced that international law should move in some of the directions indicated. He did not, for example, support the view that multilateral conventions should be replaced as the primary instruments of codification by alternative instruments of "soft codification" such as General Assembly resolutions, declarations, or restatements of customary law. "Soft law" was a contradiction in terms: what characterized law was the constraining nature of its norms - the fact that they gave rise to "hard" obligations. Other possibilities which had been suggested, such as making wider use of reservations and "opting out" procedures, would also weaken international law. If anything, international law needed to be strengthened in order to meet the needs of the international community.

82. The representative of Austria had also called attention to procedures of the Commission which merited review and had suggested that an open-ended sessional ad hoc working group should be established at the Commission's fifty-first session, which would be given a broad mandate to review the codification process in the United Nations system which would, as he understood it, include a review of both conceptual and procedural issues. A serious concern was that

consideration of conceptual issues in a working group would turn into an academic exercise of limited practical value. At the same time, the methods of work of the Commission could hardly be improved from the outside.

83. The representative of Austria had further suggested that the General Assembly might choose to intervene in the organization of work of the Commission in a bolder fashion than before. His delegation doubted the wisdom of depriving the Commission of the prerogative of conducting its own affairs. In any event, nothing should be done without consultations with the Commission.

84. The concerns raised by the representative of Austria certainly merited consideration. If a working group were to be established, its mandate should be defined more clearly. Furthermore, the Commission should be asked to provide, in its next report, a concise description of the procedures it currently followed and an assessment of the extent to which alternative procedures might make its work more effective. If such an assessment were not completed in 1996, it might be necessary to wait until the new members of the Commission had become fully familiar with existing procedures and were in a position to evaluate any proposed changes. In the long run, it might be useful to consider the possibility of revising the Statute of the Commission, which was almost 50 years old.

The meeting rose at 6.05 p.m.